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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

Nos. 591, 592, 593, 594, 595, 596, and 658

MALLONEE, BUCKLIN, FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, et al.,
Petitioners,

vs.

FAHEY, HOME LOAN BANK BOARD, et al.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, IN OPPOSITION.

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officers and directors, or any of them. Such officers and directors, or any of them shall not thereafter have, exercise, or act in connection with, any such rights, titles, powers or privileges, or any assets or property of any nature of the association; *Provided, however,* That nothing in this section shall deny to such officers and directors the right from time to time to address such petitions, authorized by the board of directors, as they may have to the Board or its representatives designated to receive such petitions concerning such association, or to represent the association at hearings provided for in the rules and regulations in this subchapter.

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BRIEF FOR RESPONDENT, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, IN OPPOSITION.

Respondent, Federal Home Loan Bank of San Francisco (hereinafter referred to as San Francisco Bank), hereby adopts and incorporates the statements as to jurisdiction, questions presented, statutes in-

volved, facts and arguments set forth in the several briefs in opposition filed by the Solicitor General of the United States on behalf of other respondents in answer to the petitions for certiorari in Nos. 591-596, inclusive, and 658.

OPINIONS BELOW.

The opinion of the United States Court of Appeals, in Appeal No. 12511, is found in 196 F. 2d at 336. The District Court's preliminary injunction with findings is found in Volume XVIII, pages 8187 through 8537, of the printed record on Appeal No. 12511.

The opinion in Appeal No. 12591 will be found in 200 F. 2d at 420 (Advance Sheet Edition). The District Court's findings of fact, conclusions of law and order re allowance of attorneys' fees on account is found in Volume I, printed record on Appeal No. 12591, pages 288 through 312.

QUESTIONS PRESENTED.

As to Appeal 12591:

(1) Whether the orders of the Home Loan Bank Administration issued March 29, 1946, pursuant to the Federal Home Loan Bank Act, readjusting the 11th Home Loan Bank District and dissolving the Federal Home Loan Bank of Los Angeles, invaded any legally protected rights of the bank or its members so as to give them standing to sue.

As to Appeal 12511:

(2) Whether an action for relief, founded upon the alleged invalidity of an administrative order appointing a conservator of a federal savings and loan association, may be maintained where such association has failed to exhaust an available administrative remedy.

(3) Whether, consistent with the policy of the Home Owners' Loan Act of 1933, the contracts and acts of a conservator of a federal savings and loan association performed before the termination of his appointment may be collaterally attacked in a proceeding to set aside each such act as void or to recover damages allegedly caused thereby or by the appointment of the conservator.

As to the consolidated cases in the District Court:

(4) Whether out-of-state service of process on the members of the Home Loan Bank Board and other non-resident respondents under either Section 1655 or Section 2361 of Title 28 USC gives the District Court jurisdiction to invalidate the administrative orders of March 29, 1946 or the order appointing a conservator of a federal savings and loan association, and whether either section authorizes an injunction, an award of money damages or attorneys' fees, or other judgment *in personam* against respondents.*

*Subsidiary questions presented are:

As to Appeal 12591:

(5) Whether prior to trial and a determination of the merits of the action claimed by plaintiffs to be *quasi in rem* and claimed by defendants to be *in personam*, the District Court is authorized to award attorneys' fees to plaintiffs' attorneys and

STATUTES INVOLVED.

The principal statutes involved are the Federal Home Loan Bank Act, 12 USC 1421, et seq., and Home Owners' Loan Act of 1933, as amended, 12 USC 1461, et seq. Also collaterally involved are Section 1655 and Sections 1335 and 2361 of Title 28 USC. (The validity of the regulations of the Home Loan Bank Administration, in effect at the time of the order appointing the conservator, relating to such appointment is established by the previous opinion of this Court in *Fahey v. Mallonee,* 332 U.S. 245). Pertinent sections of the statutes and of the rules and regulations of the Home Loan Bank Administration are set forth in the appendix.

STATEMENT.

The San Francisco Bank was established as such on March 29, 1946 pursuant to Orders 5082, 5083 and

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particularly whether such fees can be paid from funds on deposit in the registry of the court as to which San Francisco Bank claims a lien for security.

As to Appeal 12511:

(6) Whether following a determination by the District Court that the original complaints, cross-claims and third party complaints failed to state a claim upon which relief could lawfully be granted, the amended pleadings filed by leave of court and purported interventions and interpleaders ancillary to the principal case served to give the court jurisdiction to determine the validity of the order appointing the conservator and of his acts or to make any determination premised upon the presumed invalidity of such appointment notwithstanding the failure and refusal to exhaust available administrative remedies.

5084 of the Home Loan Bank Administration.[1] These orders consolidated the 11th and 12th Federal Home Loan Bank Districts, dissolved the Federal Home Loan Bank of Los Angeles and transferred all its assets, liabilities and memberships to the Federal Home Loan Bank of Portland, the principal office of which was moved to San Francisco. The consolidated institution was thereupon renamed Federal Home Loan Bank of San Francisco (12511 R. 9470-9474).[2] The three administrative orders were issued pursuant to authority expressly granted the Home Loan Bank Administration by Sections 3, 25 and 26 of the Home Loan Bank Act (12 USC 1423, 1445, 1446), and expressly determined in substantially the words of Section 26 of that Act that "the efficient and economical accomplishments of the purposes of the Federal Home Loan Bank Act, as amended, will be aided by the action."

Los Angeles Action.

On August 22, 1946, the former Federal Home Loan Bank of Los Angeles and six savings and loan

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[1]The terms "Home Loan Bank Administration" and "Home Loan Bank Board" and "Board" are used herein interchangeably to refer to the central administrative agency having supervisory control over Home Loan Banks and federally chartered savings and loan institutions, the composition and status of which underwent several changes. See *Home Loan Bank Board v. Mallonee,* 196 F. 2d 342, footnote 3 and *Fahey v. O'Melveny & Myers,* 200 F. 2d 425.

[2]References herein to "12511 R. ....." are to printed record in Court of Appeals in appeal No. 12511; references to "12591 R. ....." are to printed record in Court of Appeals in appeal No. 12591.

associations, former members of that bank and purportedly suing on behalf of all former members thereof, filed in the United States District Court for Southern District of California, Action 5678 (hereinafter referred to as "Los Angeles action"). Named as defendants were the San Francisco Bank, which was served with process in California, and John H. Fahey and others, individually and in their official capacities as officers and employees of the Home Loan Bank administration. None of the defendants other than San Francisco Bank were served with process in California, although orders for substituted service pursuant to 28 USC 1655 were obtained by plaintiffs and service made upon the official defendants in Washington, D. C. (12511 R. 9502-9512). None of such defendants have appeared generally in said action or submitted to the jurisdiction of the United States District Court in and for the Southern District of California.

The Los Angeles complaint alleged that the three administrative orders were issued without notice or hearing, were "wholly punitive and disciplinary" and were illegal, invalid and void; that such orders constituted a cloud and lien upon the title and property of Los Angeles Bank; and prayed for a declaration that the orders were void and of no effect, for the return of all its assets and for an accounting by San Francisco Bank (12511 R. 9475-9476, 9493-9494).

San Francisco Bank immediately and at all appropriate times during the course of the litigation has

objected to the jurisdiction of the United States District Court for the Southern District of California upon the grounds, among others, that the complaint presented no justiciable issue within the jurisdiction of said District Court; that the matters therein set forth were, under the Federal Home Loan Bank Act, within the exclusive jurisdiction of the Home Loan Bank Administration and that there was an absence of indispensable parties.

San Francisco Bank's objections to jurisdiction were consistently overruled by the District Court. The Los Angeles action was subsequently consolidated for all purposes with the "Mallonee action" hereinafter described.

Upon application of counsel for plaintiffs in the Los Angeles action, the District Court entered an order allowing O'Melveny & Myers and Richard Fitz-Patrick, counsel for the former Los Angeles Bank and five of the association plaintiffs, the sum of $67,500.00 on account of attorney's fees and allowing $7500.00 on account of fees to W. I. Gilbert, Jr., who in September 1949 had been substituted as counsel for the sixth association plaintiff, First Federal Savings & Loan Association of Wilmington (hereinafter called "Wilmington Association"). The order awarding fees directed that payment be made out of funds on deposit in the Registry of the Court, in which funds San Francisco Bank claims an interest, as more particularly hereinafter set forth (12591 R. 310). San Francisco Bank and others appealed from the order awarding fees.

Upon appeal the Court of Appeals held that the District Court "was without jurisdiction of the subject matter of the Los Angeles action and without jurisdiction *in personam* over indispensable parties in and to such an action" (*Fahey v. O'Melveny & Myers,* 200 F. 2d 420, 459);[3] that the action "is an unconsented suit against the United States" (*ibid.,* 458); that the three administrative orders in question "did not adversely affect, impair or confiscate 'property rights' represented by association stock ownership in the former Bank of Los Angeles" and "did not constitute an unlawful seizure, confiscation or expropriation of claimed 'private property' or 'property rights' represented by required membership in a Home Loan Bank" (*ibid.,* 470); that the payment of fees to counsel for plaintiffs out of funds on deposit in the Registry of the Court would "be an unlawful invasion of the property rights of the Bank of San Francisco represented by its 'lien rights' against this fund * * *" (*ibid.,* 480); that in any event the award of "fees would only be allowable to the 'prevailing party' after a trial on the merits" (*ibid.,* 480) but that the District Court being without jurisdiction of the Los Angeles action "the order awarding attorneys' fees cannot on any theory be affirmed" (*ibid.,* 480-481). The Court of Appeals therefore directed the dismissal of the Los Angeles action. Of the original parties plaintiff to that action

[3]References herein to the Court of Appeals opinion in *Fahey v. O'Melveny & Myers* (No. 12591) are to pages in advance sheet edition of 200 F. 2d, inasmuch as the permanent bound volume is not yet available.

and their counsel, only Wilmington Association and W. I. Gilbert, Jr. have applied to this Court for certiorari.

Mallonee Action.

On May 20, 1946 the Home Loan Bank Administration issued its order 5254 appointing A. V. Ammann conservator of Long Beach Federal Savings & Loan Association (hereinafter called "Long Beach") in accordance with the provision of the Home Owners' Loan Act of 1933, as amended (12 USC 1461 et seq.) and upon grounds specified by the Administration (12511 R. 8229). On May 27, 1946 three shareholder members of Long Beach, suing derivatively, filed in the United States District Court for the Southern District of California Action 5421 (hereinafter called "Mallonee action") for the removal of the conservator and an accounting (12511 R. 1-25). Long Beach answered substantially admitting the allegations of plaintiffs' complaint and seeking the same relief (12511 R. 302). The principal ground urged by Long Beach and the parties collaborating with it was the alleged unconstitutionality of Section 5(d) of the Home Owners' Loan Act of 1933. This Court sustained the constitutionality of that section in *Fahey v. Mallonee,* 332 U.S. 245, and held that a statutory three judge District Court had erred in holding the section unconstitutional, in ousting the conservator and enjoining his proceedings and in enjoining an administrative hearing (*Home Loan Bank Board v. Mallonee,* 196 F. 2d 336, 356).

San Francisco Bank had been named a third party defendant in the Mallonee action in a third party complaint filed by Long Beach at the time of its original answer. Long Beach and collaborating parties also alleged the invalidity of the three orders establishing the San Francisco Bank. Following the decision in *Fahey v. Mallonee,* supra, plaintiffs and Long Beach, at the suggestion of the District Court (12511 R. 10300) amended their pleadings in an effort to allege that the appointment of the conservator had been fraudulent (12511 R. 2960, 3184). The conservatorship was terminated by order of the Home Loan Bank Board in January, 1948. Ultimately by amendments and supplements filed after the removal of the conservator Long Beach sought an accounting and damages against San Francisco Bank and others on the theory that the appointment of the conservator was void *ab initio* and that all dealings with the conservator by defendants during the period of the conservatorship were illegal and of no effect and constituted conversions of property of Long Beach. Damages were claimed in excess of $30,000,000.00.

During the conservatorship San Francisco Bank had loaned to Long Beach acting through the conservator $7,300,000.00 (later paid down to $6,300,000). The loans were evidenced by four promissory notes of Long Beach executed by the conservator on behalf of the association. These were secured by the pledge of government bonds and of promissory notes of borrowers from Long Beach, each of which was in turn secured by a deed of trust (12511 R. 8403-8404).

Following the removal of the conservator, upon petition of Long Beach alleging that the notes were not binding obligations upon it, the District Court required San Francisco Bank to deposit in the Registry of the Court the promissory notes in the principal amount of $6,300,000.00 together with the collateral securing the same, i.e., government bonds and borrowers' notes and deeds of trust (12511 R. 8399-8525). The District Court then released to Long Beach the borrowers' notes and deeds of trust and "transferred" the lien of San Francisco Bank to the government bonds and so much of the cash on deposit in the Registry of the Court as was necessary to make the total of government bonds and cash equal the principal amount of the four promissory notes with interest (12511 R. 8526-8536).

At all appropriate times San Francisco Bank has objected to the jurisdiction of the District Court in the Mallonee action upon the grounds, among others, that there had been a failure to exhaust administrative remedies; that there was an absence of indispensable parties; that the action constituted an impermissible collateral attack upon the appointment and status of the conservator; and that the complaint, cross claims and third party complaints failed to set forth a claim for relief within the jurisdiction of the District Court.

On December 1, 1949 upon petition of Long Beach and collaborating parties the District Court entered an order restraining and enjoining all defendants and cross-defendants in the consolidated actions from instituting or prosecuting any administrative or legal

proceedings in any forum except the District Court for the Southern District of California (12511 R. 8194, 8306-7). Upon appeal the order was reversed primarily on the ground that plaintiffs and Long Beach had failed to exhaust their administrative remedies and that accordingly the District Court was without jurisdiction to entertain the action or to enjoin administrative or other legal proceedings.

On March 15, 1952, during the pendency of both the appeals above mentioned, the District Court appointed a receiver for the limited purpose of suing upon certain alleged causes of action. A discussion of the circumstances of such appointment is set forth under Section III, infra, page 33.

ARGUMENT.

The petitions for certiorari should be denied for the reason that the decisions of the Court of Appeals in both the Los Angeles action (200 F. 2d 420) and the Mallonee action (196 F. 2d 336) are obviously correct.

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE LOS ANGELES ACTION FAILS TO PRESENT A CLAIM WITHIN THE JURISDICTION OF THE DISTRICT COURT.

A. The former Los Angeles Bank has no justiciable interest in its own continued existence and no standing to maintain a judicial proceeding for its restoration.

The Court of Appeals has properly analyzed the question of the rights sought to be asserted by plain-

tiffs in the Los Angeles action as one dependent upon the unambiguous language of the Federal Home Loan Bank Act (12 USC 1421 et seq.). That Act provides for the establishment of a Home Loan Bank Board (hereinafter called Board) which is directed to divide the country into districts, and to establish in each such district a Federal Home Loan Bank at a city designated by the Board. The Board is specifically empowered to readjust districts (12 USC 1423). "Each Federal Home Loan Bank shall have succession until dissolved by the Board under this Act or by further Act of Congress" (12 USC 1445). The Act further empowers the Board to liquidate or reorganize a Federal Home Loan Bank, "whenever the board finds that the efficient and economical accomplishment of the purposes of this Act will be aided by such action", and in connection therewith to permit any other Federal Home Loan Bank to "acquire assets of any such liquidated or re-organized bank and assume liabilities thereof, in whole or in part" (12 USC 1446).[4] The Court of Appeals held that the Act "expresses a clear and definite Congressional purpose and intent to preempt the entire field of banking activities embraced within the terms and provisions of this banking legislation" (*Fahey v. O'Melveny & Myers,* supra, 435) and vested in the Board "wide power and authority to control the affairs and operation of banks in the Home Loan Bank

[4]No contention is made in the Los Angeles action that the Federal Home Loan Bank Act is unconstitutional or contains an unconstitutional delegation of powers to an administrative agency.

System" (*ibid.*, 435); "that the Federal Home Loan Bank Board is clearly an agency of the United States and a branch of the Executive Department of the Government" (*ibid.*, 439); and "that all Federal Home Loan Banks within the System are, and operate as, public banking agencies and instrumentalities of the federal government, and as such have no justiciable (and proprietary) interest in their continued existence" (*ibid.*, 446-447). "Nor did the Act create, or purport to create, any so-called 'proprietary rights' of association members in the continued existence of any Home Loan Bank, or 'rights' of any kind which might be successfully interposed as a bar to ending the existence of a bank if Congress, or the Board (within the terms and conditions imposed by Title 12, USCA, Section 1423) eliminated it by readjusting bank districts" (*ibid.*, 444).

B. Plaintiff savings and loan associations, as members of the former Los Angeles Bank, have no standing to maintain the Los Angeles action.

Plaintiff savings and loan associations have throughout the litigation proceeded upon the erroneous assumption that as members of the former Los Angeles Bank they had not only a proprietary interest in the continued existence of that particular bank but also other asserted "property rights" which were abridged by the three administrative orders complained of in the Los Angeles action. The Court of Appeals in examining this issue has correctly held that none of the association members of the former Los Angeles Bank suffered, as a result of the orders,

the impairment or invasion of any legally protected property right.

Plaintiff associations complained of the loss of voting power as a result of the consolidation of banks (12511 R. 9479)[5]. But the loss of voting power theretofore exercised by Southern California associations as members of the Los Angeles Bank resulted from the readjustment of Home Loan Bank Districts which readjustment is specifically authorized by the Federal Home Loan Bank Act (12 USC 1423) and is the exercise of a purely governmental power in which no association has a justiciable interest. *Mt. Pleasant v. Beckwith,* 100 US 514; *Hunter v. Pittsburgh,* 207 US 161; *Commissioner of Laramie County v. Commissioner of Albany County,* 92 US 307; *Fahey v. O'Melveny & Myers,* 200 F. (2d) 420, 466. The loss of voting power of the Southern California associations was not the result of the invasion of any legally protected right. *Sprunt and Son v. U. S.,* 281 US 249; *Edward Hines Yellow Pines Trustees v. U. S.,* 263 US 143, 147, 148; *U. S. v. Merchants and Manufacturers Traffic Association,* 242 US 178, 188; *Fahey v. O'Melveny & Meyers,* 200 F. (2d) 420, 466.

The transfer of association membership from the former Los Angeles Bank to the San Francisco Bank did not impair or adversely affect any property or other legally protected rights of member associations. The "rights" of members of a Federal Home Loan

[5]As the District Judge in a memorandum opinion (12591 R. 834) characterized the litigation "It is a quarrel apparently over power".

Bank are carefully spelled out in the Federal Home Loan Bank Act (12 USC 1421 et seq.) and the Home Owners' Loan Act of 1933, as amended (12 USC 1461 et seq.) and are to be measured by those statutes. Membership in a Federal Home Loan Bank is required of a federally chartered savings and loan association (12 USC 1464 (f)). Purchase of bank stock is a condition of membership (12 USC 1426) and such stock may not be hypothecated nor transferred except to another member with the consent of the Board (12 USC 1426 (h), (j)). Such stock ownership is not the equivalent of stock ownership in a private corporation and does not confer proprietary interest or a property right of any kind in the bank itself Cf. *Peoples Bank v. Fed. Reserve Bank of San Francisco,* 58 F. Supp. 25[6].

Thus, the fact that the Los Angeles Bank was an instrumentality of the United States and that its members possessed only the limited rights prescribed by statute compels the conclusion that the acts com-

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[6]Whatever right an association has to membership in a Federal Home Loan Bank, "it acquired and has no legal right to continue its membership *in any particular bank*—when the statute vested in the Board the power to dissolve a bank, 12 USCA § 1445, it specifically denied to members any such right."
Fahey v. O'Melveny & Myers, supra 467. "Whatever legal rights and privileges inured to the benefit of association members of Los Angeles by reason of membership in that bank were rights and privileges which they continued to enjoy as members of San Francisco. The 'transfer' of membership from one bank to the other in nowise changed or affected these rights". *ibid.,* 468. "* * * (T)he limited property rights which member associations had in their shares of stock in the Los Angeles Bank were in nowise impaired by the orders in controversy since their membership rights, as defined by statute, have remained unchanged." *ibid.,* 468.

plained of by plaintiffs in the Los Angeles action did not in fact result in injury to any legally protected rights of plaintiffs. Thus neither the plaintiff former bank as such nor the plaintiff members have standing to sue. *Perkins v. Lukens Steel Co.,* 310 US 113; *Tennessee Electric Power Co. v. TVA,* 306 US 118; *Alabama Power Co. v. Ickes,* 302 US 464; *Massachusetts v. Mellon,* 262 US 447.

Nowhere in the several petitions for certiorari do petitioners point to any error in the foregoing analysis, substantially adopted by the Court of Appeals, of the true nature of the character and status of Federal Home Loan Banks under the statute as government instrumentalities and not private corporations, of the non-proprietary character of association membership therein, and of the fact that there has been no invasion or impairment of any legally protected rights of any plaintiffs in the Los Angeles action. It is submitted that no such error exists. The conclusions of the Court of Appeals are unquestionably correct under the clear and unambiguous language of the statutes involved. All references in the petitions to "violation of due process", "unconstitutional seizures", and "seizures and confiscations" are therefore mere catchwords without any legal significance whatsoever in relation to the issues presented, considered and determined on the appeal which this Court is asked to review.

C. In any event the Los Angeles Action may not be maintained in the District Court for the Southern District of California.

Assuming without conceding, that the complaint in the Los Angeles action conceivably discloses the invasion or impairment of any of plaintiff's legally protected rights, the Los Angeles action clearly cannot be maintained in the District Court in southern California. The three orders complained of were official acts of a federal administrative agency (12511 R. 9470-9474), which said agency was and still is located in Washington, District of Columbia.

The Court of Appeals' opinion exhaustively reviews plaintiffs' contentions that the Los Angeles action is merely one to quiet title to property in Southern California and that substituted service under 28 USC 1655 on absent "official defendants" is all that is required. Each of such contentions is found to be without merit. The Court of Appeals correctly concludes that the action necessarily involves a determination of the questioned validity of the three administrative orders complained of (*Fahey v. O'Melveny & Meyers,* supra, 447); that such determination in an action without personal jurisdiction of members of the Board would be an impermissible collateral attack (*Adams v. Nagle,* 303 US 532; *Fahey v. O'Melveny & Myers,* supra, 448); and that in the absence of such personal jurisdiction any decree purporting to determine the validity of the orders would be a nullity. (*Fahey v. O'Melveny & Myers,* supra, 479.) The heart of the Los Angeles action is the alleged invalidity of the administrative orders, which can be attacked only in a direct

action to set them aside and "are valid until set aside in an appropriate judicial proceeding where the administrative authority is brought within the personal jurisdiction of the court." (*ibid.*, 448.)[7] But the members of the Board may be sued only in a proceeding brought in the District Court of the District of Columbia. *Blackmar v. Guerre*, 342 US 512. The Los Angeles action cannot therefore in any event be maintained in the Southern District of California.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE MALLONEE ACTION DOES NOT PRESENT A CLAIM WITHIN THE JURISDICTION OF THE DISTRICT COURT.[8]

A. The status of Ammann, as conservator, is fixed and is not open to collateral attack.

As noted in the preceding statement, the principal Mallonee action has become, since the removal of the conservator in January, 1948, an action to declare void the notes of Long Beach held by San Francisco

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[7]The Court of Appeals also points out that the complaint in the Los Angeles action, properly construed, is "a suit against the United States which cannot be maintained except with its consent which is here withheld. See *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682; *Amer. Dredging Co. v. Cochrane*, 190 F. 2d 106; *Seiden v. Larson*, 188 F. 2d 661." (*Fahey v. O'Melveny & Myers*, 200 F. 2d 420, 458.)

[8]The appeal clearly presented the issue of the District Court's jurisdiction. On appeal from a preliminary injunction, "the jurisdiction of the court below", the "equity of the complaint, the relief granted and all other issues are before" the appellate court. *Orth v. Transit Inv. Corporation*, 132 F. 2d 938, 944 (3d Cir.); *Smith v. Vulcan Iron Works*, 165 U.S. 518; *Re Tampa Suburban Railroad Company*, 168 U.S. 583; *Meccano Limited v. Wanamaker*, 253 U.S. 136; *Deckert v. Independence Shares Corp.*, 311 U.S. 282; *Seattle Electric Co. v. Seattle, R. & S. Ry. Co.*, 185 F. 365 (9th Cir.).

Bank and for damages founded upon the untenable premise that the appointment of the conservator was void *ab initio* and that all dealings between Ammann and defendants during the conservatorship were void, illegal and constituted conversions of property of Long Beach.

At this date there can be no doubt that the foregoing premise, which is basic to all the pleadings of Long Beach and parties collaborating with it, is wholly erroneous. This Court in this very case (*Fahey v. Mallonee,* 332 US 245) has held that it was error for the District Court to have removed the conservator; that Section 5(d) of the Home Owners' Loan Act of 1933 (12 USC 1464 (d)), is constitutional; and that the administrative rules and regulations under which the conservator had been appointed were valid. This Court has further indicated in *Ex parte Fahey,* 332 US 258, 260, that the status of the conservator is now settled. The order appointing the conservator, having been made pursuant to statutory authority, was not void *ab initio* but was valid until "set aside" in an "appropriate judicial proceeding" or terminated by "subsequent order" of the administrative agency. *U.S. v. Corrick,* 298 US 435; *U. S. v. Vacuum Oil Co.,* 158 F. 536 and *Lehigh Valley R. Co. v. U. S.,* 188 F. 879, both approved in *Yakus v. U. S.,* 321 US 414. Nor can the Mallonee action be maintained as one for the cancellation of promissory notes or for the recovery of damages for conversion upon the assumption that the conservator's actions in carrying out his administrative duties were void. Not only would such a pro-

ceeding constitute an impermissible collateral attack upon the status of the conservator (*Adams v. Nagle,* 303 US 532), but none of the conservator's actions in his official capacity and within the general scope of his authority can give rise to a claim for which relief can be granted. *Spalding v. Vilas,* 161 US 483; *Gregoire v. Biddle,* 177 F. (2d) 579; *Cooper v. O'Connor,* 99 F. (2d) 135, cert. den. 305 US 643.

B. The District Court for the Southern District of California is without jurisdiction to determine the validity of the appointment of the conservator.

The Court of Appeals has correctly determined that Long Beach had failed and refused to exhaust an available administrative remedy which was an essential prerequisite to the maintenance of any judicial proceeding to review the validity of the Ammann appointment and hence that the complaint, cross-claims and third party complaints failed to set forth a ground for relief within the jurisdiction of the court. The Court of Appeals makes clear that the administrative order appointing the conservator was unquestionably preliminary and procedural and did not constitute final agency action (*Home Loan Bank Board v. Mallonee,* 196 F. (2d) 336, 375, 380, 382) which would have been subject to judicial review. Plaintiffs not only failed to avail themselves of the prescribed administrative remedy, but they obtained in July, 1946, an injunction restraining the holding of an administrative hearing upon the appointment of the conservator (12511 R. 372). The "refusal of Association to avail itself of the administrative remedy tendered

in May, 1946, * * * deprived it and/or members of the Mallonee-Association group of the legal right to demand and receive at the hands of the Court the relief sought * * *" (*Home Loan Bank Board v. Mallonee,* supra, 378).

The District Court frankly recognized in November, 1947, that under this Court's prior decision (*Fahey v. Mallonee,* 332 US 245) the original pleadings of the Mallonee-Association group "failed to state a claim upon which *any* relief could be granted by a federal court" (*Home Loan Bank Board v. Mallonee,* supra, 378). The Court however permitted the amendment of pleadings to allege in general terms that the appointment of the conservator had been "fraudulent", which the district court and petitioners argue served retroactively to give the district court jurisdiction. But the fact remains, as is recognized by the district court and all parties, that, even after amendment, the central and controlling question of the *Mallonee* case is the validity of Ammann's appointment and of his acts during the conservatorship.

Petitioners' assertions that the Court of Appeals decision conflicts with that of this Court in *Fahey v. Mallonee* are founded upon the theory that the latter authorizes judicial relief "where fraud is alleged". Although the amended pleadings allege generally that certain acts were "fraudulent", they do not contain any specific and direct allegations which constitute a sufficient allegation of fraud. Moreover, the Court of Appeals in exhaustively reviewing the former opinion of this Court (*Home Loan Bank Board v. Mallonee,*

supra, 355-357), correctly interprets the final words of that opinion, i.e. "without prejudice to any other administrative or judicial proceedings which may be warranted by law" as a specific reference by this Court "to further *administrative proceedings* which would eventuate in a final agency determination which decided the validity of * * * the Ammann appointment." (*ibid.* 378.) Thus both opinions indicate that the appointment constituted preliminary agency action and that further action leading to a final administrative determination is essential prior to judicial review. To infer anything else from the *Fahey v. Mallonee* decision of this Court would result in overruling by mere implication the long established line of authorities holding that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.,* 303 US 41, 50-51; *Macauley v. Waterman Steamship Corp.,* 327 US 540; *Goldsmith v. U. S. Board of Tax Appeals,* 270 US 117, 123; *Federal Power Comm. v. Arkansas Power & Light Co.,* 330 US 802.

There having been not only a failure to exhaust administrative remedies but also affirmative action resulting in enjoining tendered administrative review, the Court of Appeals correctly determined that the original pleadings, founded upon the presumed invalidity of Ammann's appointment, failed to state a case within the jurisdiction of the Federal Court. Even after the removal of the conservator when the administrative agency sought again to exercise ad-

ministrative authority, the Long Beach interests sought and obtained a further injunction; the Court of Appeals has correctly ruled that the injunction of December 1, 1949, cannot stand because the District Court was without jurisdiction to entertain the action in which it was entered.

In the absence of the exhaustion of available administrative remedies testing the validity of the Ammann appointment, the District Court was likewise without jurisdiction to entertain an action seeking the cancellation of Long Beach notes held by San Francisco Bank and recovery of damages from respondent San Francisco Bank or other defendants alleged to result from their dealings with the conservator[9]. As previously noted, the order of appointment and Ammann's status thereunder are not subject to collateral attack. The administrative agency which appointed Ammann and the members of the present Home Loan Bank Board whose final administrative determination would, under the Court of Appeals opinion, be subject to judicial review are not person-

[9]This result is not affected by the suggestion of petitioner Willhoit that Order 388 of the Home Loan Bank Board in January 1948 terminating the conservatorship constituted "final" agency action. (No. 658 p. 20) The text of that order is set out in footnote 18 of the Court of Appeals opinion (196 F. 2d 336, 384) and shows on its face that the Board did not purport to examine or pass upon the validity of the original appointment; it cannot therefore constitute an exhaustion of administrative remedies testing the validity of the appointment or final agency action in that respect. The validity of Ammann's acts as conservator are therefore unaffected by the termination of the conservatorship and the termination itself could not result in imposing liability upon San Francisco Bank or other defendants for having dealt with Ammann as conservator during the conservatorship.

ally before the District Court. The only service upon them is a substituted service under 28 USC 1655 which of course does not give the court jurisdiction *in personam.* In any event, personal jurisdiction over such administrative officials is obtainable only in the place of their official residence (Washington, D.C.) and not in Southern California. *Blackmar v. Guerre,* 342 US 512.

C. The Court of Appeals' opinions do not result in the clouding or reclouding of titles of homeowners.

Petitioners erroneously assert that the dismissal of the Mallonee action because of lack of jurisdiction will cloud or recloud the titles of thousands of homeowners. The claim of "cloud on title" is and always has been a spurious issue in this litigation.

The *titles* of homeowners, who borrowed from Long Beach on loans secured by trust deeds of their homes, have never been involved in the litigation nor in any sense clouded thereby.[10] The sole question raised has

[10]Borrowers from Long Beach gave installment promissory notes for the payment of their loans. Each note was secured by a deed of trust on real property of the borrower. Title Service Company (controlled by Long Beach) was the trustee and Long Beach the beneficiary of such trust deeds. Upon full payment of the loan, the borrowers were entitled to a reconveyance of their property. Normally, the beneficiary would instruct the trustee in writing to make such reconveyance.

At the time Long Beach, acting through the conservator, borrowed money from San Francisco Bank, it assigned as collateral security large numbers of the promissory notes of its borrowers together with the deeds of trust securing such notes. Under the terms of the collateral security agreement between Long Beach and the San Francisco Bank and consistent with the general practice followed by the bank with all savings and loan associations for which the bank performs reserve banking functions, Long Beach had the right to substitute collateral and whenever a borrower paid

been whether Ammann as conservator or the former management of the association should on behalf of Long Beach direct Title Service Company, as trustee, to reconvey trust deeds upon repayment of loans by the borrowers. Title Service Company refused to make such reconveyances at the direction of Ammann upon the asserted ground that Long Beach had informed the trustee that the conservator had no authority to act for Long Beach (12511 R. 53). But the status of Ammann as conservator was fixed (*Fahey v. Mallonee,* 332 US 245, *Ex parte Fahey,* 332 US 258) and was not open to collateral attack (*Adams v. Nagle,* 303

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his loan to Long Beach, Long Beach could obtain a release of such borrower's promissory note and deed of trust from San Francisco Bank, and if necessary substitute other collateral adequately to secure its indebtedness to San Francisco Bank. Thus, neither the loans of San Francisco Bank to Long Beach, acting through Ammann, its conservator, nor the litigation had any necessary effect upon the titles of individual home owners.

Long Beach and its affiliated interests have themselves attempted to enmesh the home owners' titles in the litigation by filing notice of *lis pendens* and by proceedings in the District Court to prevent the conservator from effecting reconveyances to home owners during the conservatorship. The Land Title Company, which offered to insure titles without regard to the alleged cloud on title, was promptly and for this reason named a defendant and co-conspirator in the Mallonee action (12511 R. 3033-3039). The District Court required borrowers desiring to pay off their loans to intervene in the Mallonee proceedings, make payment into Court and then receive from Title Service a reconveyance of their trust deeds. Approximately 50 of such intervention proceedings were had resulting in the impound of approximately $1,600,000.00 in cash in the registry of the court (12511 R. 8288-8291 n). The District Court's requirements for such deposit of loan payments made by borrowers ultimately froze so much of Long Beach's capital in the registry of the court as to seriously embarrass the further operation of the association by the conservator. As a further result "the lower court was finally forced to supervise a great many of the details of a modern banking business and thereby face all of the vexations that accompany such an unusual task." (*Home Loan Bank Board v. Mallonee,* 196 F. 2d 336, 370.)

US 532). Accordingly Title Service Company was without any legal authority to refuse to reconvey upon Ammann's instructions and in all probability would not have done so had not Title Service Company at all times been dominated and controlled by the deposed management of Long Beach. Title Service Company, according to the testimony of T. A. Gregory (12511 R. 11077-11088), is a California corporation, organized by the management of Long Beach in 1935, without issued capital stock, with officers and directors substantially identical with those of Long Beach. Title Service Company is therefore but a corporate shell, an *alter ego* of Long Beach.

Since the removal of the conservator in January, 1948, there has been even less basis for asserting that the homeowners' titles are or can be in any way affected by the Mallonee litigation. All that is now required to remove any purported cloud on the title of any home is a direction from Long Beach to Title Service Company, its trustee, for reconveyance.

The reconveyances of title heretofore made by Title Service Company to those borrowers who paid off their loans are not dependent upon the validity of any court orders which were previously entered in the interpleader and intervention proceedings ancillary to the Mallonee action. The lien by way of security was removed by payment of the debt followed by the recording of reconveyance from Title Service Company, the trustee. No one is questioning or can question the validity of those acts. Long Beach is estopped from

questioning them because it consented to the payment of the loans into court and to the reconveyance made by Title Service Company.

Nor does the pending action of San Francisco Bank against Long Beach for recovery of $6,300,000.00 on promissory notes, originally filed in the Superior Court of the State of California, in and for the County of Los Angeles, and upon petition of Long Beach removed to the District Court (motion to remand pending), constitute any possible cloud upon homeowners' titles. Petitioners incorrectly assert that the action is one to foreclose upon homeowners' titles. The State court action of San Francisco Bank, a conformed copy of the complaint in which was filed with the Court of Appeals on April 4, 1952, seeks a judgment for repayment of loans in the aggregate amount of $6,300,000.00, and a decree establishing and enforcing a lien upon so much of the entire assets of Long Beach as is necessary adequately to secure the repayment of such obligation. San Francisco Bank is required by the Home Loan Bank Act to make loans to associations only upon proper and adequate security. It has no authority to make or permit an unsecured loan (*Home Loan Bank Act,* Sec. 10, 12 USC 1430). If, as the Court of Appeals has indicated, the District Court was without jurisdiction to require the impound of the promissory notes in the principal amount of $6,300,000.00 and collateral, and to order the release to Long Beach of certain collateral, San Francisco Bank is clearly entitled to the return of its promissory notes together with so much

of its original and substituted collateral as may still be impounded, and any deficiency of such collateral must be replenished out of other assets of Long Beach, e.g., the cash of Long Beach which is still retained in the registry of the Court. All this can properly and effectively be accomplished by the mandate of the Court of Appeals in connection with the dismissal of the Mallonee action. No legal title of any homeowner who is a past or present borrower from Long Beach would be affected thereby. San Francisco Bank makes no claim upon the property or title of any homeowners; its claim is asserted against the property of Long Beach. Moreover, it should be noted that the State Court action in question is solely against Long Beach and its property and not against any homeowner or any homeowner's property. How such an action could be said to "recloud" or foreclose titles of homeowners is beyond comprehension.

D. The collateral and ancillary proceedings do not confer jurisdiction upon the District Court in the principal Mallonee action nor do they disclose any basis for independent federal jurisdiction.

Among petitioners are Title Service Company (No. 596), Home Investment Company (No. 593) and Robert H. Wallis and George Turner (No. 595) who had filed so-called cross-claims in interpleader in the Mallonee action. A summary of the pleadings of Title Service Company, Wallis, and Home Investment Company is set forth in the Court of Appeals opinion (*Home Loan Bank Board v. Mallonee*, supra, 348-349). The Court of Appeals has correctly character-

ized these purported interpleaders as ancillary and subsidiary to the principal Mallonee action. Each is based on alleged conflicting demands arising during the period of the conservatorship[11] as a result of the dispute between Ammann and the then former management of Long Beach as to who was legally authorized to represent and act for Long Beach. They thus necessarily present the same basic issue as the principal Mallonee action, i.e. the status of Ammann as conservator, the determination of which issue, as heretofore shown, was beyond the jurisdiction of the District Court. "The validity of their [the interpleaders'] claims rested upon the validity of the claims of Association." (*ibid.*, 379.) They thus "failed to tender an issue or issues which presented a claim upon which relief could have been granted by the court". (*ibid.*, 379).

Moreover, the purported crossclaims in interpleader do not disclose any basis for independent federal jurisdiction as interpleaders or otherwise. The alleged conflicting claims as between the conservator and the Home Loan Bank administration on the one hand, and the Long Beach interests on the other, were not between "adverse claimants" in the sense that term is employed in former 28 USC 41(28), now 28 USC 1336. The "claim" of the conservator and the administrative agency was that of supervision and management of Long Beach under Sec. 5(d), Home Owners' Loan Act of 1933, as amended, (12 USC 1464 (d)) and

[11]The Turner "interpleader" was filed subsequent to the removal of the conservator in January 1948.

was not a claim of title to Long Beach property. In any event such purported interpleaders could not have afforded a basis for service upon and the acquisition of *in personam* jurisdiction over non-resident defendants for the purpose of maintaining the complaint and Long Beach's cross-claim for damages and other relief against non-resident defendants. *Stitzel-Weller Distillery Inc. v. Norman,* 39 F. Supp. 182.

The purported Long Beach interpleader of the promissory notes due San Francisco Bank fails to provide a basis for jurisdiction of such interpleader proceeding or of the principal Mallonee action. The motion of Long Beach and the resulting impound in the registry of the District Court of the $6,300,000.00 of promissory notes and collateral securing the same is said to have been necessary because of alleged uncertainty as to whether the San Francisco or Los Angeles Banks exist in addition to Long Beach's attack upon the authority of Ammann to have made the loan transaction and bind Long Beach thereby. As previously noted neither of those issues are within the jurisdiction of the District Court. In addition the alleged adverse claimants, San Francisco Bank and the former Los Angeles Bank, if it can be said to exist for any purpose, is each a citizen of the United States and not of any "state" and there is thus no diversity of citizenship among all the adverse claimants and no basis for federal interpleader (*Bankers Trust Co. v. Texas & P. R. Co.,* 241 US 295, Anno. 88 A.L.R. 873-4; 28 USC 1335, 2361). If the Los Angeles Bank and San Francisco Bank are citizens of any state, they are both

citizens of California and cannot be "adverse claimants" within the meaning of Section 1335. The erroneous impound of property in the Registry of Court, pending the determination of issues over which the Court has no jurisdiction, obviously does not result in investing the Court with such jurisdiction as to either the principal or ancillary proceedings.

Nor does Long Beach's "interpleader" of insurance premiums due the Federal Savings and Loan Insurance Corporation afford a basis for jurisdiction in interpleader or in the principal Mallonee action. The purported insurance premium interpleader is entirely specious; the alleged adverse claimants are the Federal Savings & Loan Insurance Corporation and the shareholder members of Long Beach represented by the Mallonee group, who sue in a derivative capacity. The case is simply one between two corporations upon a debt where it is said that stockholders of the debtor are conflicting claimants who may be interpleaded.

Each of the purported interpleaders not only do not serve in any way to infuse jurisdiction in the District Court in either the Los Angeles or Mallonee actions, but being wholly ancillary and without independent basis for federal jurisdiction they must fall with the principal cases. "If the relief then demanded from the Court by the Mallonee-Association group was improperly and unlawfully granted by the Court, it is certain that the ancillary and subsidiary claims of these litigants which arose only out of claims of Association, were without substance in law. * * * If the

claims of Association were untenable in law, it is obvious that the claims of these litigants could rise no higher than their source." *Home Loan Bank Board v. Mallonee,* supra, 379.

III. THE PETITIONS OF THE RECEIVER AND INTERVENOR FAIL TO DISCLOSE ANY GROUNDS FOR CERTIORARI.

Petitioners "Ernest R. Utley, as receiver for Federal Home Loan Banks of Los Angeles, Portland, or San Francisco, whichever exists" (No. 594) and John D. Willhoit (No. 658) were not parties to the consolidated actions at the time of entry of either of the orders which were appealed to the Court of Appeals and were not parties appellee in the proceedings therein.

The District Court on March 15, 1952, on motion of Wilmington Association, one of the associations plaintiff in the Los Angeles action and over the objection of San Francisco Bank and the official defendants, entered its order appointing a receiver for the limited purpose of filing certain purported actions to protect and conserve the property and assets theretofore deposited in Court (under the so-called interpleaders and interventions previously herein discussed) against the possible bar of the statute of limitations. The motion for appointment, in which Long Beach and collaborating parties joined, alleged and the Court found "that many contentions and claims are made in this consolidated action concerning the validity of said notes [referring to Long Beach notes payable to San

Francisco Bank in principal amount of $6,300,000.00] and the validity and lawfulness of the conduct, transactions and actions of various persons and institutions and occurrences connected with the execution of said notes" and that "among other questions arising and requiring decision on the merits of the within litigation are those concerning the validity of the orders which created or attempted to create the San Francisco Bank." The District Court thus founded its order for appointment of a receiver upon the untenable premises that the validity of both the order appointing the conservator and the orders readjusting bank districts and establishing the San Francisco Bank were matters then within that Court's jurisdiction. The Court did not find a necessity for the appointment of a receiver, but merely that it would be "in the interest of justice" to preserve and protect property on deposit in Court against the possible bar of the statute of limitations.[12]

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[12]Lest this Court be misled, it should be noticed that the Receiver's petition to this Court omits reference to the fact that prior to the motion for appointment of receiver, San Francisco Bank had moved the District Court for leave to file an amended cross-claim in the consolidated action and for modification of the injunction of December 1, 1949 to permit San Francisco Bank to file an action in the State court upon its promissory notes, which modification having been denied was subsequently obtained from the Court of Appeals. San Francisco Bank also declined to follow the District Court's suggestion to name parties other than Long Beach as defendants in its cross-claim and action upon said notes for the reasons that Long Beach is named maker of said notes and solely liable thereon and that practically all other suggested defendants asserted to be possibly liable "by way of an action-over, or otherwise" are non-residents of California as to whom personal jurisdiction could not conceivably be obtained in the California State Court or in the District Court for Southern California.

San Francisco Bank promptly appealed the order appointing the receiver. Said appeal is pending, but neither briefed nor argued before the Court of Appeals. If it is finally established that the Court of Appeals correctly determined that the District Court lacked jurisdiction to entertain either the Los Angeles or Mallonee actions, then the receivership must fall regardless of any questions of necessity or propriety for the receiver's appointment, for the petition for appointment is wholly ancillary and fails to disclose any independent grounds of federal jurisdiction. The receiver as an officer and arm of the Court may not engage in the principal litigation on behalf of either of the parties litigant (*Booth v. Clark,* 58 US 302; *Metropolitan Trust Co. v. North Carolina Lumber Co.,* 162 F. 170, 179; *Bowerstock Mills & Power Co. v. Joyce,* 101 F. (2d) 1000; Clark on Receivers (Second Ed.) 803, Sec. 590).

Petitioner Willhoit filed his complaint in intervention in the consolidated litigation, pursuant to leave granted by the District Court on October 27, 1952, more than six months after the opinion of the Court of Appeals holding that the District Court was without jurisdiction to entertain the principal Mallonee action. Petitioner now complains of the Court of Appeals' order entered November 24, 1952, staying all proceedings in the Court below in the consolidated actions pending determination of appeals 12511 and 12591. Certainly a person seeking to intervene at this late date in litigation which has been before the Court since May, 1946, must accept the case as it exists at

the date of intervention. In view of the April, 1952, opinion of the Court of Appeals, an application for stay could not be said to be an illogical possibility. In fact the granting of the Willhoit petition for intervention was itself a contributing factor impelling these respondents to seek such stay, all efforts to obtain such relief from the District Court having proved unsuccessful. Willhoit was not foreclosed from opposing the proposed stay, but appeared and presented his arguments to the Court of Appeals.

Willhoit is admittedly not a party to either appeal here considered. But for the stay, his interests are in nowise affected and his petition fails to disclose any respect in which the granting of the stay pending final determination of the appeals is erroneous. Moreover, as has been pointed out both to the District Court and Court of Appeals, if Willhoit is actually concerned with recovery of purported records alleged to have been in the custody of Long Beach prior to conservatorship, he misconceives his remedy; in his pending proceeding before the United States Tax Court he has the unquestioned right to obtain from that Court a subpoena of nationwide reach to enable him to locate and obtain any such records (26 USC 1114).

CONCLUSION.

For the foregoing reasons, neither the Los Angeles nor the Mallonee actions present any claims for relief within the jurisdiction of the District Court. Each of the petitions implies that the Court of Appeals' decisions if sustained would adversely affect the stability and functioning of the entire federal home loan bank system, with its several regional banks, its hundreds of savings and loan institutions and thousands of individual member borrowers from such institutions. Quite the reverse is true. The simple, central issue in the consolidated cases is the validity of four administrative orders, issued pursuant to statutory authority which is clear and unambiguous beyond reasonable question. This Court has already confirmed the validity of the order appointing Ammann. The Court of Appeals has followed that decision and held that none of the four administrative orders are subject to collateral attacks of the sort attempted in this litigation before the District Court in Southern California.

The injection of collateral pleadings, far from affording any basis for jurisdiction to maintain either action, is indeed a persuasive ground for directing the dismissal of the entire proceeding. Such collateral proceedings graphically illustrate the use of the Mallonee action and ancillary proceedings first as a means of crippling and rendering impossible the practical continuance of the conservatorship and then as a means of coercing non-resident Government and other defendants by harrassing and vexatious litigation, and thereby requiring them to abandon the Government's

and San Francisco Bank's defenses to money damage claims as a condition of restoring the normal exercise of supervisory authority and banking facilities throughout the entire western United States.

The dismissal of the consolidated action and all its adjuncts pursuant to the opinions of the Court of Appeals will serve to re-establish the supervisory and managerial powers of the Home Loan Bank administration over the important home loan bank system and will enable the administrative agency and the San Francisco Bank to perform their clearly delegated functions and duties to the full extent of the responsibility imposed upon them, without the harrassment of collateral attacks and obstructions of the sort here employed. This is not to say that the government agencies and instrumentalities here involved are to be free of all control or of judicial restraint in an appropriate forum following final administrative action. But it does mean that under the plain language of the statute administrative action is not to be so impaired as to leave either a particular home loan bank or individual savings and loan institutions free of all supervision and control whatever. The Court of Appeals by exhaustive and penetrating analysis of the great "melange of issues" into which the litigation has proliferated has laid bare the few central and controlling issues of the litigation. Petitioners assiduously fail to discuss those issues or to specify any respect in which the Court of Appeals erred in their determination. Repondent San Francisco Bank respectfully submits that the present and future soundness, stability and use-

fulness of the home loan bank system will be enhanced and the public interest will be served by denial of the petitions for writs of certiorari.

Dated, San Francisco, California,
April 15, 1953.

Respectfully submitted,
SYLVESTER HOFFMANN,
Attorney for Respondent,
Federal Home Loan Bank
of San Francisco.

VERNE DUSENBERY,
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Of Counsel.

(Appendix Follows.)

Appendix

Federal Home Loan Bank Act as Amended
(12 USC 1421 et seq.)

* * * * * * *

Sec. 3. As soon as practicable the board shall divide the continental United States, Puerto Rico, the Virgin Islands, and the Territories of Alaska and Hawaii into not less than eight nor more than twelve districts. Such districts shall be apportioned with due regard to the convenience and customary course of business of the institutions eligible to and likely to subscribe for stock of a Federal Home Loan Bank to be formed under this Act, but no such district shall contain a fractional part of any State. The districts thus created may be readjusted and new districts may from time to time be created by the board, not to exceed twelve in all. Such districts shall be known as Federal Home Loan Bank districts and may be designated by number. As soon as practicable the board shall establish, in each district, a Federal Home Loan Bank at such city as may be designated by the board. Its title shall include the name of the city at which it is established (12 USC 1423).

* * * * * * *

Sec. 25. Each Federal Home Loan Bank shall have succession until dissolved by the board under this Act or by further Act of Congress (12 USC 1445).

Sec. 26. Whenever the board finds that the efficient and economical accomplishment of the purposes of

this Act will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part (12 USC 1464(d)).

* * * * * * *

HOME OWNERS' LOAN ACT OF 1933 AS AMENDED ..
(12 USC 1461 et seq.)

* * * * * * *

SEC. 5 (d). The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation (12 USC 1464(d)).

* * * * * * *

FEDERAL HOME LOAN BANK ADMINISTRATION
RULES AND REGULATIONS

(Effective Prior to August 15, 1949; by Reorganization Plan No. 3 of 1947, the Federal Home Loan Bank

Administration, referred to in these regulations, was succeeded by the Home Loan Bank Board.)

* * * * * * *

206.1. *Receiver or conservator, appointment.* Whenever, in the opinion of the Federal Home Loan Bank Administration, any Federal savings and loan association:

(1) is conducting its business in an unlawful, unauthorized, or unsafe manner;

(2) is in an unsound or unsafe condition, or has a management which is unsafe or unfit to manage a Federal savings and loan association;

(3) cannot with safety continue in business;

(4) is impaired in that its assets do not have an aggregate value (in the judgment of the Federal Home Loan Bank Administration) at least equal to the aggregate amount of its liabilities to its creditors, members, and all other persons;

(5) is in imminent danger of becoming impaired;

(6) is pursuing a course that is jeopardizing or injurious to the interests of its members, creditors, or the public;

(7) has suspended payment of its obligations;

(8) has refused to submit its books, papers, records, or affairs for inspection to any examiner or lawful agent appointed by the Federal Home Loan Bank Administration;

(9) has refused by the refusal of any of its officers, directors, or employees to be examined upon

oath by the Federal Home Loan Bank Administration or its representative concerning its affairs; or

(10) has refused or failed to observe a lawful order of the Federal Home Loan Bank Administration, the Federal Home Loan Bank Administration may appoint the Federal Savings and Loan Insurance Corporation receiver for such Federal association, which appointment shall be for the purpose of liquidation, or the Federal Home Loan Bank Administration may appoint a conservator for such Federal association to conserve the assets of the association pending further disposition of its affairs. The appointment shall be by order, which order shall state on which of the above causes the appointment is based. Any conservator so appointed shall furnish bond for himself and his employees, in form and amount and with surety acceptable to the Governor of the Federal Home Loan Bank System, or any deputy or Assistant Governor, but no bond shall be required of the Federal Savings and Loan Insurance Corporation as receiver. The conservator or receiver shall forthwith upon appointment take possession of the association and, at the time such conservator or receiver shall demand possession, such conservator or receiver shall notify the officer or employee of the association, if any, who shall be in the home office of the association and appear to be in charge of such office, of the action of the Federal Home Loan Bank Administration. The Secretary of the Federal Home Loan Bank Administration shall, forthwith upon adoption thereof, mail a certified copy of the order of appointment to the

address of the association as it shall appear on the records of the Federal Home Loan Bank Administration and to each director of the association, known by the Secretary to be such, at the last address of each as the same shall appear on the records of the Federal Home Loan Bank Administration. If such certified copy of the order appointing the conservator or receiver is received at the offices of the association after the taking of possession by the conservator or receiver, such conservator or receiver shall hand the same to any officer or director of the association who may make demand therefor. (Sec. 5 (a), (d), of H.O.L.A. of 1933, 48 Stat. 132, 133; 12 U.S.C. 1464 (a), (d); E.O. 9070, 7 F.R. 1529).

206.2. *Hearing on appointment.* Within fourteen days (Sundays and holidays included) after the appointment of a conservator or receiver for a Federal association not at the time of such appointment in the hands of a conservator, such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may file an answer and serve a written demand for a hearing, authorized by its board of directors, which demand shall state the address to which notice of hearing shall be sent. Upon receipt of such answer and written demand for a hearing the Federal Home Loan Bank Administration shall issue and serve a notice of hearing upon the institution by mailing a copy of the order of hearing to the address stated in the demand therefor and shall conduct a hearing, at which time and place the Federal association may ap-

pear and show cause why the conservator or receiver should not have been appointed and why an order should be entered by the Federal Home Loan Bank Administration discharging the conservator or receiver. Such hearing shall be held either in the district of the Federal Home Loan Bank of which such Federal association is a member or in Washington, D. C., as the Federal Home Loan Bank Administration shall determine, unless the association otherwise consents in writing. Such hearing may be held before the Federal Home Loan Bank Commissioner or before a trial examiner or hearing officer, as the Federal Home Loan Bank Administration shall determine. Such Federal association, which has not, by its board of directors, consented to or requested the appointment of a conservator or receiver, may, within seven days (Sundays and holidays included) of such appointment, serve a written or telegraphic demand, authorized by its board of directors, upon the Federal Home Loan Bank Administration for a more definite statement of the cause or causes for the action. The time of service upon the Federal Home Loan Bank Administration for the purposes of this Section shall be the time of receipt by the Secretary of the Federal Home Loan Bank Administration. (Sec. 5 (a), (d), of H.O.L.A. of 1933, 48 Stat. 132, 133; 12 U.S.C. 1464 (a), (d); E.O. 9070, 7 F. R. 1529).

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HAROLD B. WILL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

Nos. 591, 592, 593, 594, 595, 596, and 658.

MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, et al., *Petitioners*,

v.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, et al., *Respondents*.

PETITIONERS' REPLY TO OPPOSITIONS TO CERTIORARI

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 11767

Nos. 591, 592, 593, 594, 595, 596, and 658.

MALLONEE, BUCKLIN and FERGUS, SHAREHOLDERS' PROTECTIVE COMMITTEE, and LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, et al., *Petitioners,*

v.

FAHEY, AMMANN, as Conservator, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, et al., *Respondents.*

PETITIONERS' REPLY TO OPPOSITIONS TO CERTIORARI

WHY REPLIES NECESSARY

Petitioners feel compelled to reply to the briefs in opposition to granting of certiorari:

(a) because of inaccuracies and misstatements therein which might mislead the Court; and

(b) to call to the Court's attention the March 9th, 1953 decision of *Unexcelled Chemical Corp.* v. *U. S. A.*, October 1952 Term, No. 293, which was decided subsequent to filing on February 10, 1953 of certiorari petitions herein. (See page 6 hereof).

I. PROTECTION OF PUBLIC WELFARE REQUIRES CERTIORARI.

Petitioners and respondents however agree on one point,—the nationwide importance of the Court of Appeals' decisions of first impression, which vitally affect the entire Federal Savings System.[1]

Enforceability of $10,000,000,000.00 of Federal savings insurance, in favor of 12,000,000 depositors and borrowers, the existence of 1,500 Federal Savings and Loan Associations and Federal Home Loan Banks throughout the Nation, should not rest upon a decision of merely one Circuit.

If, the 200 pages of opinions of the Court of Appeals are erroneous, reversal is imperative to save the public welfare.

If, on the other hand, the Court of Appeals' opinions are in any part correct (which petitioners vehemently deny), then the U. S. Supreme Court itself should render its own opinions, to separate from the mass of error, such correct statements of law, if any there be.

Opposition briefs of both the Government and San Francisco Bank, by their very questions presented, demonstrate the imperative necessity of certiorari to obtain authoritative U. S. Supreme Court decision of such vital questions.

II. RESPONDENTS' FRAUDS MUST BE TRIED.

Both the original and amended pleadings unqualifiedly charge personal corruption transcending criminal liability, i.e., the adoption by respondents of their "rule or ruin"

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[1] The Petition for certiorari in No. 591, pages 24 to 30, are not only undenied, but pages 5 to 10 of the Government's brief in opposition demonstrate the grave consequences to the public welfare and the deposited savings and mortgaged homes of the millions of citizens affected by banks, savings institutions, or Government loans on their homes and insurance of their savings deposits.

policy, and the deliberate wrecking of any financial institution daring to oppose (Apl. No. 12511, R. 3184-3339).

Summarized the allegations of fraud[2] are:

(a) Fraudulent and malicious instantaneous liquidation and dissolution of the solvent $46,000,000.00 Federal Home Loan Bank of Los Angeles, solely because said Bank refused to elect as its president respondent Fahey's palace favorite.[3] (Apl. No. 12511, R. 341-578).

(b) Fraudulent and malicious seizure, without any justification, of the solvent $26,000,000.00 Long Beach Federal Savings Association, with the intent to merge and destroy it. Seizure, intended merger, and destruction, of the Savings Association was solely because its president, T. A. Gregory, resisted confiscation of the Los Angeles Bank and had sought Congressional Investigation of respondent Fahey, (Apl. No. 12511, R. 305-340). Such seizures were also to terrify and intimidate all Savings Associations, members of the seized Los Angeles Bank, and to prevent the court actions they were about to commence against respondent Fahey to recover their seized Bank and its $46,000,000.00 of assets, (Apl. No. 12511, R. 343).

In 1947, after the remand from the U. S. Supreme Court, the District Court, after hearing and upon evidence, made its finding, (Apl. No. 12511, R. 2355-2358):

> ". . . That . . . defendants . . . Fahey and . . . Ammann intended to merge or consolidate the Long Beach

[2] False and fraudulent statements, writings, or documents, made or used, ". . . Within the Jurisdiction of any Department or Agency of the United States . . ." are felonies (Title 18 U.S.C. 1001); as is the affixing of the Seal of such Department or Agency to such fraudulent matter (Title 18 U.S.C. 1007).

[3] The president of a Federal Home Loan Bank holds life and death power over all member Savings Associations by denying them credit in times of emergency. Congress provided such officers should be elected by the Bank directors. Federal Home Loan Bank Act, Title 12 U. S. C., Section 1427.

> Federal Savings . . . Association with other financial institutions and did intend thereby to destroy its identity and goodwill and to comingle and disperse its asssets and memberships by comingling them with the assets and memberships of other financial institutions, and thus render moot the questions presented in this litigation, and . . .
>
> ". . . would thereby have caused an immediate and irreparable loss and damage to the plaintiffs and other shareholder members of the Long Beach . . . Association, . . ."

Respondents, in 1947, appealed this judgment to the Court of Appeals for the Ninth Circuit, (Appeal No. 11751). The appeal was dismissed in 1948.[4]

(c) Refusal to return or account for $26,000,000.00 of depositors' seized savings.

The District Court rejected respondents' first accounting as insufficient, (Apl. No. 12511, R. 8987-8996). Respondents refused to account for, or justify, payments (and charges) of over $160,000.00 by respondents to themselves, for "conservator's expense". Petitioners also demand surcharge for $5,000,000.00 of illegal loans, made upon security falsely represented by conservator to be first liens, but actually second or junior liens. The objections charge F. H. A. and V. A. insurance of said loans is void because of falsifications by the removed conservator in applying for insurance upon such loans. Refusal to account for trustee funds paid by respondents to themselves and making loans on fraudulent security, are of course breaches of trust, as well as criminal offenses.

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[4] See *United States* v. *Munsingwear*, 340 U. S. 36, 95 L. Ed. 36—(1950), wherein this Court said at page 38 of the U. S.:

> ". . . the United States . . . acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.
>
> ". . .
>
> ". . . The case ilustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation."

Respondents' answer to these allegations, (page 36 of Government's opposition in No. 591), is:

> "... it is 'better to leave unredressed the wrongs done by dishonest officers ...' ... The same considerations apply to petitioners' demand for an accounting ..."

$160,000.00 paid (or charged) from the depositors' seized savings to respondents themselves, for which they refuse to account in any way, and $5,000,000.00 of falsified loans, are referred to (page 42 of Government's opposition in No. 591), as:

> "... The synthetic allegations of fraud ..."

In *American Bank* v. *Federal Reserve Bank of Atlanta*, 256 U. S. 350, 65 L. Ed. 983 (1921), the U. S. Supreme Court said at page 358 of the U. S.:

> "... If without a word of falsehood, but acting from what we have called disinterested malevolence, a man by persuasion should organize and carry into effect a run upon a bank, and ruin it, we cannot doubt that an action would lie ..."

Six years ago, in this same litigation, in *Fahey, et al.* v. *Mallonee, et al.*, 332 U. S. 245, (91 L. Ed. 2030), at pages 256-257, this same U. S. Supreme Court said:

> "Nor do we mean to be understood that if supervising authorities maliciously, wantonly and without cause destroy the credit of a financial institution, there are not remedies."

and remanded to the District Court for trial, (Apl. No. 12511, R. 2302-2304).

In the interval of six years, respondents have twice refused to account for petitioners' seized savings, and have prevented the trial of their own frauds, by 21 writs, appeals, and actions (detailed on pages 49-51 of petitioners' combined appendix Nos. 591-596). Because respondents,

with their unlimited resources,[5] have caused 11,000 pages of printed record, and have thereby delayed and prevented trial for six years, respondents' urge the case must be now dismissed without respondents' fraud and corruption ever being tried.

III. CONFLICT BETWEEN MARCH 1953 U. S. SUPREME COURT OPINION AND COURT OF APPEALS.

In *Unexcelled Chemical Corp.* v. *U. S. A.*, October 1952 Term, No. 293, decided March 9, 1953, (97 Adv. L. Ed. No. 9, page 486), in an unanimous opinion, this Court said:

> "... A cause of action is created when there is a breach of duty owed the plaintiff . . . The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings before the Secretary of Labor have been completed (Far East Conference v. United States, 342 US 570, 96 L ed 576, 72 S Ct 492; Thompson v. Texas Mexican R. Co., 328 US 134, 90 L ed 1132, 66 S Ct 937; General American Tank Corp. v. El Dorado Terminal Co., 308 US 423, 84 L ed 365, 60 S Ct 325; United States v. Morgan, 307 US 183, 83 L ed 1211, 59 S Ct 795) is a matter of judicial administration and of no relevancy here. The statutory liability accrued when the minors were employed. It was from that date that the period of limitations began to run."

The Court of Appeals' opinions (certiorari review of which is herein sought), are in direct and unalterable conflict with such U. S. Supreme Court holding. On page 381 of 196 F. (2d), the Court of Appeals says:

> "The doctrine of exhaustion of administrative remedies requires not merely the initiation of prescribed administrative procedures; it requires pur-

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[5] Over 50 different attorneys, including Assistant Attorneys General, U. S. Attorneys, and special counsel, have appeared for respondents in the 21 appeals, etc. Petitioner Federal Savings Association has had but *one* counsel throughout the seven years of litigation.

> suing them to their appropriate conclusion and awaiting their final outcome before seeking judicial intervention. . . ."

If certiorari be denied, and the class actions of the 16,000 depositors and 8,000 homeowners, commenced in 1946, be now, 7 years later, dismissed without trial, judicial relief from respondents frauds and personal corruption is forever denied.

California statutes of limitation are short, (from 90 days to 5 years). All have long since expired.

Respondent Federal Savings and Loan Insurance Corporation has already pled the statute of limitations to these actions,[6] notwithstanding they were filed in 1946, 7 days after the seizure of the Association.

Government respondents, on page 45 of their opposition brief in No. 591, state:

> ". . . a dismissal of this case with its unmanageable record obviously is the practical solution."

By denying and refusing demanded administrative hearings,[7] until after the expiration of the statutes of limitations, and then in 1949 without any request, on their own initiative,[8] calling the administrative hearings they refused and denied in the prior years, respondents have created for themselves the defense of the statutes of limitations to any new actions which could hereafter be filed by the 16,000 depositors or 8,000 homeowners. Yet respondents would persuade this Court to now dismiss for "failure to exhaust administrative remedies", — administrative remedies refused and denied by respondents until after expiration of the statutes of limitations.

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[6] Petitioners' combined appendix in Nos. 591-596, at pages 24-25.

[7] Petitioners' combined appendix in Nos. 591-596, at pages 19-21.

[8] Petitioners' combined appendix in Nos. 591-596, at pages 35-39.

IV. 8,000 HOMEOWNERS YET THREATENED WITH FORECLOSURE.

All respondents, now 7 years later, deny that any homeowners' titles were ever clouded, but in 1946-1948, on more than 50 separate occasions, distressed homeowners, unable to finance or convey their homes, intervened in the District Court and sought relief. On more than 50 separate occasions the District Court found:

> "... that grave and irreparable damage will be suffered by the Petitioners [homeowner borrowers] through being unable to clear the title to their said real property ..."[9]

On more than 50 separate occasions the District Court compelled respondents to deliver to the Clerk of the District Court, seized notes and deeds of trust. On each of these 50 occasions such orders were made for the express purpose of relieving the distressed homeowners from the clouds on their titles, which the District Court found to exist. On each of the 50 separate occasions respondents complied with the order of the District Court and surrendered and delivered to the Clerk of that Court seized notes, deeds of trust, and money, all for the purpose of clearing the homeowners' clouded titles.

Over $20,000,000.00 in such notes, Government bonds, and deeds of trust, were so surrendered and delivered by respondents to the Clerk of the District Court. Yet, respondents (at page 25 of San Francisco Bank's opposition to certiorari) assert:

> "... The claim of 'cloud on title' is and always has been a spurious issue in this litigation."

Counsel for a Government Agency ask the Supreme Court to believe that they surrendered over $20,000,000.00 to the Clerk of the District Court on a "spurious issue", and

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[9] Petitioners' combined appendix in Nos. 591-596, at pages 42-43.

that the Court to which they made such surrender was then, and now is, wholly without jurisdiction.

California lending practice differs from most Eastern States which use the mortgage form of security for loans. California uses the *deed* of trust, by which deed the borrower conveys title to his home to a trustee. The trustee holds such title either to reconvey to the borrower by reconveyance deed, if the loan is paid off, or to convey to the lender by trustees deed, if the borrower defaults.

By seizure of petitioner Association, respondent Ammann obtained possession of thousands of such deeds of trust and the thousands of notes secured thereby, (aggregating approximately $12,000,000.00). Ammann immediately assigned said deeds of trust, and endorsed said notes:[10]

"Pay to the Order of the Federal Home Loan Bank of San Francisco

Long Beach Federal Savings and Loan Association

By A. V. Ammann
Conservator"

and physically delivered possession of the assigned notes[11] and deeds of trust to respondent San Francisco Bank.

Respondent Ammann's assignments purportedly conveyed to respondent San Francisco Bank title to the thousands of notes and deeds of trust, and thereby clouded the title to the thousands of borrowers' homes.

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[10] All such endorsements by respondent conservator were undated, perhaps because of a restraining order of the District Court prohibiting transfer of petitioners' seized savings. (Apl. No. 12511, (R. 33).

[11] Petitioners' combined appendix in Nos. 591-596, Plate 5, pages 40-41.

Respondent San Francisco Bank has never re-assigned, reconveyed, or otherwise released the title it acquired by such assignments.[12]

The 1946-1948 final judgments of the U. S. District Court cancelling said assignments and re-vesting title in petitioner Association are the vital links in the homeowners' chain of title.

If the District Court "... never had ... jurisdiction over the subject matter ..." as the San Francisco Bank alleges in its 1952 foreclosure, (and as the Court of Appeals holds), these vital links are broken and the homeowners' chain of title falls with the jurisdiction of the District Court.

But the time for appeal from these final quiet title judgments expired 5 (or more) years ago. Appeals taken in 1947 by respondents from some of such orders were dismissed in 1948.[13] No appeals were ever taken from any others.

In 1952, the Court of Appeals is without authority to vacate these 5 year final quiet title judgments, from which no appeal was ever taken, or from which appeals were taken in 1947 and dismissed in 1948.

Nor, can the subterfuge of dismissing the complaints, cross-claims, etc., upon which these final judgments rest, accomplish indirectly what the Court of Appeals is without power to do directly.

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[12] Except as to about 200 returned to Ammann during the conservatorship.

[13] See *United States* v. *Munsingwear*, 340 U. S. 36, 95 L. Ed. 36—(1950), wherein this Court said at page 38 of the U. S.:

> "... the United States ... acquiesced in the dismissal. It did not avail itself of the remedy it had to preserve its rights.
> "...
> "... The case illustrates not the hardship of *res judicata* but the need for it in providing terminal points for litigation."

The March 1952 order[14] of the Court of Appeals permitting respondent San Francisco Bank to "foreclose", is but another device by respondents to evade the 5 year final quiet title judgments of the District Court.

Respondent San Francisco Bank's only right to foreclose the homeowners is based upon the assignments from conservator Ammann, assignments cancelled five years ago by final judgments of the District Court. Nevertheless respondent San Francisco Bank now seeks such foreclosure of $7,000,000.00. Its complaint reads in part, on page 7, lines 11 to 21:

> "That said defendant [Long Beach Federal] assigned, delivered and pledged to plaintiff . . . promissory notes secured by mortgages or deeds of trust on real property . . . as security for the repayment of said sums advanced and loaned to said defendant by said plaintiff . . . That by reason of said assignments and pledges said *Plaintiff* became, ever since has been and *still is* the owner and holder of *a lien* upon all said pledged and assigned property." (Emphasis added).

The complaint prays judgment, at page 2, line 11:

> "For judgment foreclosing its aforesaid lien in the manner as provided by law;"

Such foreclosure suit names as defendant, petitioner Long Beach Federal Savings and Loan Association, the record owner of the several thousand notes and deeds of trust on the borrowers' homes, foreclosure of which is thus prayed for.

In March of 1948, the District Court, as part of the mass interpleader to clear the titles to the borrowers' homes,

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[14] Made by the Court of Appeals without notice to the homeowners who had paid their loans in full to the District Court, but yet are to be foreclosed, and vacating interpleader injunctions from which no appeals were ever taken, without notice to the parties who obtained such interpleader injunctions.

made its final judgment, which read in part, (see petitioners' combined appendix in Nos. 591-596, at page 46):

> ". . . any and all endorsements appearing on . . . the notes and trust deeds . . . in favor of said Federal Home Loan Bank of San Francisco . . . are hereby cancelled, and the title thereto . . . is hereby revested in said Long Beach Federal Savings and Loan Association."

In its $7,000,000.00 foreclosure complaint, respondent San Francisco Bank alleges, (on page 9, paragraph XIV, lines 3 to 7 thereof, in part as follows:

> ". . . the aforesaid U. S. District Court never had and does not now have jurisdiction over the subject matter of said action, . . ."

The holding of the Court of Appeals that the District Court is without jurisdiction nullifies all of the foregoing quiet title judgments in favor of the homeowners, and exposes them to loss, both of the money they have paid, (or caused to be paid), into the District Court, and the titles to their homes, cleared and quieted by such payments.

The disclaimer by counsel of any intent to foreclose on the homeowners, appears nowhere in the record in the Court of Appeals, nor in the $7,000,000.00 foreclosure action in the U. S. District Court. It occurs for the first time in respondents' opposition to certiorari in the U. S. Supreme Court.

Its reliability may be judged by the written stipulations of respondents' counsel. The written stipulation of the Assistant Attorney General of the United States, filed with the U. S. District Court in 1949, and relied upon by that Court and all counsel, (Apl. No. 12591, R. 297-299), has been held by the Court of Appeals in Appeal No. 12591, at page 67 of the slip opinion, to be utterly worthless.[15]

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[15] In *Swift* v. *U. S.*, 276 U. S. 311, (73 L. Ed. 587) (1927), on page 331, this Court held that agreements filed with the District Court by the Attorney General were binding upon the United States.

The 1948, five year final quiet title judgments of the District Court in favor of the homeowners and against respondents, have been held by the same Court of Appeals to be equally worthless. (Page 99 of the slip opinion in Appeal No. 12591).

Eight thousand homeowners have paid off the loans on their homes in full into the registry of the U. S. District Court in reliance on the 1947 mandate of this Honorable U. S. Supreme Court for "further proceedings". They now ask what, if any, protection remains for their homes if both the written word of the Assistant Attorney General of the United States, filed with the District Court, and five year final quiet title judgments of the U. S. Courts, are both merely "scraps of paper".

V. CALIFORNIA HOMEOWNERS' TITLES CAN BE CLEARED ONLY BY U. S. DISTRICT COURTS IN CALIFORNIA.

Respondents seized, assigned and conveyed, $26,000,000.00,—the savings of 16,000 depositors, and titles to the homes of 8,000 borrowers, all in California.

Only the U. S. Courts in California which have physical jurisdiction of the seized savings deposits and the thousands of homes (real property) can protect the depositors and homeowners. Federal interpleader jurisdiction is nationwide. The district of a U. S. Court in interpleader is the boundaries of the United States. It includes the District of Columbia.[16]

Treinies v. *Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 85—(1940), at page 70 of the U. S.:

> ". . . Process may run at least throughout all the states."

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[16] Title 28 U. S. C., Sec. 1332. "*Diversity of citizenship:* . . . (b) The word 'States', . . . includes . . . the District of Columbia." Sec. 1335. "*Interpleader* . . . (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 . . ."

Further at page 74 of the U. S.:

> ". . . Such authority is essential to the protection of the interpleader jurisdiction and is a valid exercise of the judicial power . . ."

See also *Title 28 U. S. C., Sec. 2361.*

Respondents' insistence that only the District of Columbia courts have personal jurisdiction, denies all court relief to 12,000,000 Federal Savings depositors and homeowners of the 48 states.

Respondent San Francisco Bank today, foreclosing $7,000,000.00 of denied liability against the homes of 8,000 California borrowers, could not be summoned to the District of Columbia to prevent such foreclosure, nor could any decree of a District of Columbia court reach, nor affect, the seized and assigned savings and homes (real property) in California, nor in any of the 48 states.

When Congress enacted that respondent Federal Savings and Loan Insurance Corporation and Federal Home Loan Bank of San Francisco should "sue and be sued, complain and defend, in any court of law or equity, *State* or Federal,"[17] it intended suit throughout the United States. There are no *State* courts in the District of Columbia.

Seven Oaks v. *F. H. A.*, 171 F. (2d) 947 (C. C. A.—4, 1948), at page 949:

> ". . . Congress . . . could hardly have intended that persons in California, . . . desiring to exercise the right to sue must travel to the District of Columbia to do so . . ."

District of Columbia courts are completely without authority over California real estate, but U. S. Courts, within whose territory California real estate is situated, can exercise the nationwide interpleader jurisdiction expressly conferred by Acts of Congress, and protect the

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[17] Petitioners' combined appendix in Nos. 591-596, at page 13.

seized titles to the homes of the thousands of borrowers against confiscation by actions of respondents, citizens of the District of Columbia.

VI. THE CALIFORNIA DISTRICT COURT HAS PERSONAL JURISDICTION OVER GOVERNMENT RESPONDENTS.

A. In Interpleader.

Throughout respondents' oppositions, they repeatedly assert that the U. S. District Court has no personal jurisdiction over them.

But, in their 1947 brief to the U. S. Supreme Court in this same case (October 1946 Term, Nos. 687 and 133 Misc.), they admit that nationwide interpleader process of the U. S. Court in California was personally served on respondent Fahey, who was then the one-man Home Loan Bank Board.

They said at page 11:

> "Service of process upon Fahey under both cross-claims in interpleader was made in the District of Columbia . . ."

They now seek in their oppositions to confuse who are the conflicting claimants and deny diversity of citizenship between such claimants. All such matters are clearly set forth with references to original and amended pleadings in our petitions.[18]

B. Government Respondents Have Made General Appearances In The District Court.

After the remand from the U. S. Supreme Court to the District Court "for further judicial proceedings", respondents Home Loan Bank Board adopted their official

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[18] See pages 9 to 11 of petition No. 596, and pages 19 to 21 of petition No. 593, for complete analysis of interpleader jurisdiction, diversity of citizenship, and refusal of Supreme Court in 1947 to dismiss these interpleader cross-claims. See also Finding of District Court re claims of respondents, Apl. No. 12511, R. 8282.

resolution No. 388 (Apl. No. 12511, R. 8231). The District Court found (Apl. No. 12511, R. 8283):

> "77. That said Resolution No. 388, in part, provided as follows:
>
> > " 'Be It Further Resolved that a certified copy of this resolution be forthwith delivered to the above-named Court and to counsel for each of the parties of record in actions numbered 5254 P.H. and 5678 (WM) P.H. in said Court. . .'
>
> "That a certified copy of said resolution was duly and regularly filed in the within case, in the above-entitled Court, and that on January 23, 1948, after hearing, this Court made its order and judgment for restitution of said Association (Exhibit 'A' attached hereto), which Order was based among other things upon the said resolution or Order No. 388, . . .
>
> "That as a matter of law and fact, the filing of said Order No. 388, constitutes a general appearance by said Board, in the within action, and the submission by said Board to the jurisdiction of this Court . . . That adjudications upon said Order No. 388 as herein otherwise set forth, have not been completely, or finally, made in that the rights and liabilities of the various parties, during the said period of conservatorship, have not yet been determined, nor has the accounting of said Ammann as conservator been approved.
>
> "78. That time for appeal from said Order and Judgment of this Court, dated January 23, 1948, has long since expired without any appeal therefrom having been taken. That said defendants have made no efforts or taken any proceedings to vacate or set aside said judgment before this or any other court."

At the hearing upon such general appearance of respondents, they sought from the District Court:

(a) The appointment of a Special Master. The District Court appointed their own attorney, Ronald Walker, as Special Master, to conduct a special election

of directors of petitioner Association by its 16,000 shareholders.[19] (Apl. No. 12511, R. 10314-10326).

(b) A $1,000,000.00 surety bond, furnished by the officers of petitioner Association, indemnifying against the very misconduct respondents complain of in their oppositions to certiorari. Such $1,000,000.00 surety bond has been on file with the District Court for 5 years. Neither respondents, nor any one, has made any effort to enforce any claims against such bond. (Apl. No. 12511, R. 10333).

(c) A court order approving every act of the conservator as valid and binding upon petitioner Association, regardless of its untried objections thereto. The court refused to make such order.

Respondents' attorneys unqualifiedly signed:

> "The undersigned hereby consent to and approve the foregoing order."

at the end of the order appointing their own attorney as the Court's Special Master. The following page hereof is a photostatic copy of the signature page of such order.

By such removal of conservator and general appearance before the District Court by respondents' own Order No. 388, the issues of administrative hearing and "exhaustion of administrative remedies" became moot forever.

By such consent they waived forever all questions of personal jurisdiction of the U. S. District Court, in both the Mallonee action and the Los Angeles Bank action.

Swift v. *U. S.*, 276 U. S. 311, 73 L. Ed. 587, (1927).

Walling v. *Miller*, 138 F. (2d) 629—(C.C.A.-8—1943).

Respondents' Order No. 388 expressly referred to both actions by number. The actions had been "consolidated

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[19] Such election resulted in unanimous re-election of the founding management without a single dissenting vote—the management respondents accused of misconduct.

The undersigned hereby consent to and approve the foregoing Order.

Westover and Smith
by Wyckoff Westover - attorneys for the Plaintiffs - Petitioners

Charles H. Chapman atty for T. B. Fed. Savings & Loan Ass'n

Thos. H. Kuchel By H. Mauser,
Attorney for Agricultural Adjustment
Farm Loans Corp.

James Mc Carter
U.S. Attorney

William F. McKenna
Chief Trial Counsel Home Owners Loan Corp.

O. Melvoin & Myers by
John Wright
Atty for Def. party defendant
and Respondent Individual
Home Loan Bank of Los Angeles

Raymond Cremaring
atty for Claimant
Robert A. Wallis

for all purposes" (Apl. No. 12511, R. 2788), by the District Court. The judgment and order to which respondents signed ". . . consent . . . and approve . . ." was made in the consolidated cases.

VII. RESPONDENTS REFUSE ADMINISTRATIVE HEARINGS YET DEMAND DISMISSAL FOR "FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES".

On page 20, in footnote 48, of Government respondents' opposition in No. 591, they admit that they refused and denied the demand of "minority" Long Beach shareholders for administrative hearings, and that such refusal was because the matters were pending in the U. S. District Court in California.[20]

Yet, in their opposition to the homeowners' petition for certiorari, No. 593, on page 3, footnote 2, Government respondents state:

> "Petitioner, [homeowners] as an interested party, could have asked for leave to intervene in the administrative proceeding."

The same claim is repeated as to other interpleaders on page 3, footnote 1 of respondents' opposition in No. 595, and elsewhere throughout their oppositions.

Respondents admit that they refused and denied administrative hearings to the shareholders because their own regulations authorized administrative hearings only:

> ". . . at the request of the association's directors . . ."

Yet, in 1949, after the expiration of the statutes of limitations, respondents, at no ones' request, set their own administrative hearing to appoint themselves receiver of the Association in order to obtain control of the depositors' litigation against respondents.

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[20] Petitioners' combined appendix in Nos. 591-596, at pages 20-21.

Access to the courts of the United States cannot be prevented by denial of administrative hearings until after all statutes of limitation have expired, and all actions are forever barred.

VIII. ACTION FOR RETURN OF SEIZED SAVINGS AND ACCOUNTING IS NOT A COLLATERAL ATTACK ON CONSERVATOR'S APPOINTMENT.

Throughout respondents' briefs in opposition, they misstate petitioners' objectives. Regardless of the validity of respondent conservator's appointment, petitioners are entitled to the return of *all* of their savings, and an accounting for what was seized.

Respondents' position is that they can seize any Federal Home Loan Bank or Federal Savings Association, with complete immunity, — immunity from receipting for $26,000,000.00 in uncounted cash, bearer bonds, and negotiable securities, —immunity from returning any part of the seized uncounted cash and bonds,—and immunity from ever accounting for how much was seized or for what was done with the depositors' seized savings.

To paraphrase respondents' opposition to No. 591, on page 36:

> "... it is 'better to leave unredressed the wrongs done by dishonest officers than to subject ...' " them to the "... constant dread ..."

of accounting for the seized $26,000,000.00 in uncounted cash, bearer bonds, and negotiable securities.

IX. ANSWER TO CHARGES AGAINST MANAGEMENT.

Respondents claim their seizure of Long Beach was justified by appropriation of $100,000.00 for defense of Long Beach against respondents' seizure and confiscation, and by other charges of misappropriations.

The appropriation for attorneys' fees was deposited in interpleader in the U. S. Courts seven years ago, (within

a few days after the appropriation was made) (Apl. No. 12511, R. 8267).

No attorneys' fees have ever been either appropriated or paid from Association funds for defense of "management".

Petitioners' attorneys fees have been paid *only* by order of the District Court, and *only* for defense of the Savings Association against respondents confiscations.

Respondents, in *Ex Parte Fahey,* 332 U. S. 258, 91 L. Ed. 2041, sought prohibition against the District Judge to prevent payment of any attorneys fees,—even to the Shareholders' Protective Committee.

In 1947 the Supreme Court denied the writ.

After denial of prohibition by the Supreme Court, respondents, in Appeal No. 11751, to the Court of Appeals, sought stay of payment of attorneys fees. After printed briefs and full argument, the Court of Appeal denied stay. This appeal was dismissed in 1948.

Both respondent Fahey (former Bank Commissioner) and Divers (Chairman of respondent Home Loan Bank Board), made their affidavits (Apl. No. 12591, R. 52-54) that:

> "That the Home Loan Bank Board has never taken or proposed to take any disciplinary action of any kind against any savings and loan association . . . on account of its use of funds to contest the . . . appointing a conservator for the Long Beach Federal Savings and Loan Association or its use of funds for litigation in connection therewith, . . ."

Long Beach's management at all times was, and yet is, under surety bond. A $200,000.00 surety bond has at all times been in the possession of respondents. A $1,000,000.00 surety bond was filed by Long Beach management with the District Court in 1948 (Apl. No. 12511, R. 3553-3556-A, 8233). The express terms of such bonds cover the very allegations made by respondents. Yet, in seven years, no action to collect on either surety bond has ever been taken by respondents or any one (Apl. No. 12511, R. 8233).

Respondents also complain of creation by Long Beach management of $21,000.00 of voting accounts in a $26,000,000.00 Association.

At respondents' express request, the District Court in 1948 appointed as its Special Master, respondents' own former attorney, Ronald Walker, who conducted under the Court's supervision, a special election of the 16,000 depositors. Long Beach's founding management was unanimously re-elected without a single dissenting vote.

The Special Master's report to the Court was accepted by the Court without objection by respondents or any one (Apl. No. 12511, R. 6120).

The $21,000.00 of voting accounts have never been voted at any time.

In 1948 respondents returned the remnants of the seized Savings Association to the identical management from which it had been seized. They then refused demanded administrative hearings on such charges. In 1949 they revived these same charges as a pretext for a second seizure, to appoint themselves receiver and liquidate the Association, the litigation, and the necessity for accounting, (Apl. No. 12511, R. 8263-8267). Respondents own counsel, an Assistant Attorney General, admitted under oath that the charges were for "horse trading".[21]

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[21] Hearings before a Special Subcommittee of the Committee on Expenditures in the Executive Departments, House of Representatives, Eighty-first Congress, Second Session, and Eighty-second Congress, First and Second Sessions, Investigation of the Home Loan Bank Board, at pages 1540-1541 of the transcript of such hearings:

> Q. "Very frankly, Mr. MacGuineas, was the Board prepared to wipe out these charges if a settlement could have been reached?"
>
> "MR. MACGUINEAS . . . Any settlement is going to result in a net compromise . . ."
>
> Q. "It is a question of horse trading?"
>
> "MR. MACGUINEAS. Of course. Why, any settlement of a complicated case must necessarily be that. So my thought was we would try to trade . . ."

Respondent Adams, member of respondent Home Loan Bank Board, stated under oath, the seizures:

"... were arbitrary and capricious and vindictive, ..."

X. SUPERVISION MUST NOT MEAN DESTRUCTION.

Respondents complain that they have been prevented from supervision of petitioner Association, yet they admit that in 1946 they seized $26,000,000.00 of deposited savings of 16,000 depositors, (Apl. No. 12511, R. 8215), caused a $10,000,000.00 run, (Apl. No. 12511, R. 8249), purported to borrow $7,300,000.00 on the security of the seized savings deposits, and in January of 1948 returned the remnants of the seized Federal Savings Association to the very management from which they had seized it.

Respondents' attempted accounting for the seized savings has been rejected by the District Court, (Apl. No. 12511, R. 8987-8996), yet respondents demand, on penalty of liquidation of the Savings Association, that petitioners verify under oath, (in the form of monthly and annual reports) all of the bookkeeping entries made by seizing respondents, who for nearly two years were in possession of the Savings Association, (Apl. No. 12511, R. 8277). Such verification by Association would admit liability for the $7,000,000.00 denied debt. Petitioners did not sign the notes, nor receive the loaned money. The debt was created by respondents in violation of applicable statutes, regulations, and a court restraining order, (Apl. No. 12511, R. 33). The District Court has found, (Apl. No. 12511, R. 8278), such verification:

> "... would ... require said Association to prejudice, waive, or abandon the litigation of the Association's shareholders in the class action herein brought on behalf of said shareholders, without the consent, agreement, or knowledge of said shareholders, ..."

Supervision, as practiced by respondents against petitioner Savings Association, means liquidation, (Apl. No.

12511, R. 8253), and destruction, prevented only by the injunction of the District Court, pending trial of the fraudulent seizures (Apl. No. 12511, R. 8217) by respondents and their accounting for the depositors' seized savings.

XI. FEDERAL SAVINGS DEPOSIT INSURANCE NULLIFIED.

Petitioners have sued in the U. S. District Court in California for enforcement of, and declaratory relief concerning, the $22,000,000.00 of Federal insurance of their seized savings, insured by respondent Federal Savings and Loan Insurance Corporation.

The Court of Appeals has ordered dismissal without trial.

On pages 45-46 of Government respondents' opposition to certiorari in No. 591, the Insurance Corporation states:

> "... any claims on this score are premature."

but in their answer, filed in the District Court,[22] respondent Insurance Corporation pled:

> "... this action against this defendant is barred by the statutes of limitations. ..."

Denial of certiorari and dismissal of the 16,000 depositors' class action to enforce Federal Insurance of their $22,000,000.00 of seized savings deposits would forever bar institution of another action now, seven years after the seizure.

XII. JURISDICTION OF U. S. DISTRICT COURT IS RES JUDICATA.

Our point that jurisidiction of the District Court is res judicata[23] is answered by Government respondents only in

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[22] Petitioners' combined appendix in Nos. 591-596, at pages 24-25.

[23] Petition No. 591, page 43; petition No. 593, page 34; and petition No. 596, page 27.

their opposition to No. 591, where, on page 44, footnote No. 82, they state:

> ". . . the judgments upon which petitioners rely are merely interlocutory decisions . . . This issue was thoroughly briefed in the court below."

But in the Court below, respondents conceded that the judgments are final. On page 34-35 of respondents' combined brief to the Court of Appeals, in Appeal No. 12511, they state in part:

> ". . . the Conservator was removed by the court below (R. 8310). The order of January 23, 1948, insofar as it terminated the conservatorship, was final, and, no appeal having been filed within the time allowed, the propriety thereof is no longer open for consideration."

XIII. PETITIONERS HAVE STANDING TO SUE AND A JUSTICIABLE INTEREST TO PROTECT.

By seeking dismissal without trial, respondents admit all the allegations of petitioners' pleadings. Such allegations as to Los Angeles Bank, summarized, are:

Respondents seized without notice or hearing, summarily liquidated, instantaneously dissolved and merged, the $46,000,000.00 Federal Home Loan Bank of Los Angeles, of which petitioners are stockholders and members (Apl. No. 12511, R. 9465-9501).

Petitioners' stock in said seized Bank represented ownership in the assets of the Bank of a value of $132.00 per share (Apl. No. 12511, R. 9498). By such seizure and merger, petitioners were deprived of $32.00 per share, and can now receive only $100.00 per share. The total of such stock is over $6,000,000.00, and the amount thus lost by the class of stockholders represented by petitioners approximates $2,000,000.00 (Apl. No. 12511, R. 9498).

In addition to stockownership, petitioner Long Beach Association had on deposit with the Los Angeles Bank, for safekeeping only, $8,500,000.00 of U. S. Government bonds,

owned by Long Beach alone (Apl. No. 12511, R. 8402). Such bonds were seized by respondents as part of the Los Angeles Bank seizure, and have never been returned to said Association.[24]

Said seizures, dissolution and merger, were beyond any statutory or other authority of respondents. They were without due or any process of law, are unconstitutional, and represent only the individual will of respondents.

Such acts are wholly void. The seizures and instantaneous liquidation were made fraudulently, maliciously, and without any basis in fact or law. They were against the will, and without the consent, of any of the stockholders and members of both the Los Angeles and Portland Banks (Apl. No. 12511, R. 286-302, 9465-9501).

Respondent Adams, member of respondent Home Loan Bank Board, admits under oath[25] that the seizures and instantaneous liquidation without notice or hearing, were:

> "... arbitrary and capricious and vindictive, ..."

In *United States* v. *I. C. C.*, 337 U. S. 426, 93 L. Ed. 1451, (1949), this Court said at page 431 of the U. S.:

> "... But the Government charged that the order was issued arbitrarily and without substantial evidence. This charge alone would be enough to present a justiciable controversy ..."

In *Land* v. *Dollar*, 330 U. S. 731, 91 L. Ed. 1209, (1947), this Court said at page 738 of the U. S.:

> "... public officials may become tortfeasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, re-

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[24] Yet respondents contend confiscation of $8,500,000.00 of privately owned bonds does not present a justiciable issue, and that petitioners can never question what became of this seized property or seek its return.

[25] See Petition No. 591, page 9, footnote No. 2.

> coverable by appropriate action at law or in equity, . . . The dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld."

In *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U. S. 441, 91 L. Ed. 408, (1947), this Court said at page 444 of the U. S.:

> ". . . the determination of the extent of the authority granted the Board . . . is subject to judicial review . . . the District Court is authorized to enjoin . . . if the Board transcends its bounds and acts beyond the limits of its statutory grant of authority (citing authorities) . . ."

In the above case, a single director was unlawfully removed. In our present case, the entire Home Loan Bank for the West Coast was abolished and its entire assets were confiscated.

In *Stark* v. *Wickard*, 321 U. S. 288, 88 L. Ed. 733, (1943), this Court said at page 305 of the U. S.:

> ". . . on the allegations of the complaint these producers have such a personal claim as justifies judicial consideration . . ."

At page 310 of the U. S. this Court further said:

> ". . . Congress established courts to adjudicate . . . claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power."

In *Joint Anti-Fascist* v. *McGrath*, 341 U. S. 123, 95 L. Ed. 817, (1951), this Court said at page 136 of the U. S.:

> ". . . Where an act of an official plainly falls outside of the scope of his authority, he does not make that act legal by doing it and then invoking the doctrine of administrative construction to cover it."

In *Youngstown, Etc.* v. *Sawyer,* 343 U. S. 579, 96 L. Ed. 1153, (1952), this Court said at page 655 of the U. S.:

> ". . . The executive action we have here originates in the individual will of the President and represents an exercise of authority without law . . ."

In the Los Angeles Bank seizure and instantaneous liquidation, respondents make no pretense of any wrongdoing or misconduct on the part of the Bank or its management. The only justification is ". . . the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act, . . ."[26] The falsity of this pretext is self evident. "Efficiency and economy" are not accomplished by instantaneously merging a $46,000,000.00 solvent and growing reserve bank into a $9,000,000.00 bank unable to show any growth in its 10 years of existence, (Apl. No. 12511, R. 9154).

"Efficiency and economy" do not require instantaneous ex parte seizure and liquidation nor do they require secrecy and concealment in transporting the seizure and liquidation orders 3,000 miles to be executed summarily, (Apl. No. 12511, R. 9140), so as to prevent recourse to the courts, or Congress, by the bank to be instantaneously dissolved without notice or hearing.

Respondents claim such action is within their statutory right. Petitioners allege the contrary.

Even a casual reading of the Act demonstrates such summary ex parte confiscation and infliction of corporate death, are beyond any statutory powers of respondents.

Respondents could remove an officer or director of a bank only by stating the ". . . cause of such . . . removal . . . in writing . . ." (Title 12 U. S. C. 1437).

Respondents could remove any member of a Bank from membership only ". . . after hearing . . ." (Title 12 U. S. C. 1426(i)).

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[26] Petitioners' combined appendix in Nos. 591-596, at page 9.

Respondents could liquidate or reorganize a Bank only when the ". . . board finds . . ." (Title 12 U. S. C. 1446).

By respondents' own regulations, notice and hearing were required before the action they took in this case. (Title 24 C. F. R. Cum. Supp. (1944) Sec. 8.3 (b)(c)) (Apl. No. 12511, R. 9141).

Such were respondents powers conditionally granted by Congress, to be exercised only upon the stated conditions. Respondents actions nowhere complied with such limitations.

Respondents removed not one, but the entire board of directors and every officer of the Los Angeles Bank without ever stating ". . . the cause of such . . . removal . . . in writing . . ."

Respondents removed, not one, but 173 members from membership in the Los Angeles Bank without any ". . . hearing . . . " ever being held.

Respondents liquidated, dissolved and merged the Los Angeles Bank without ever making any "finding", giving any notice, holding any hearings or taking any evidence.

All such were contrary to the express limitations of the Acts of Congress, the only source of respondents claimed authority. Respondents actions were final. No reconsideration or other agency review is available.

Almost every cabinet officer, government agency, board or bureau, has been held subject to suit when it or they exceed statutory authority.

In *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U. S. 441, the Federal Reserve Board was held so subject to suit.

In *Land* v. *Dollar*, 330 U. S. 731, the Maritime Commission was held so subject to suit.

In *Stark* v. *Wickard*, 321 U. S. 288, the Secretary of Agriculture was held so subject to suit.

In *Joint Anti-Fascist* v. *McGrath*, 341 U. S. 123, the Attorney General of the United States was held so subject to suit.

In *Williams* v. *Fanning*, 332 U. S. 490, the Postmaster General was held so subject to suit.

In *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, the Secretary of the Interior was held so subject to suit.

In *Youngstown, Etc.* v. *Sawyer*, 343 U. S. 579, the Secretary of Commerce, exercising the express authority of the President, was nevertheless held so subject to suit.

It is fundamental that no agency can validly act beyond its authority or in violation of the Constitution. Respondents did both.

Respondents have shown no cause whatsoever why they alone of the entire Government, should be singled out and granted authority to violate both the statutes of their creation and the Constitution.

Our ". . . government of laws and not of men . . ." has ceased to exist if these seizures, based only on ". . . the individual will of . . ." respondents, and an ". . . exercise of authority without law . . ." are beyond the power of all Courts to rectify.

Respondents 169 pages of opposition to certiorari are replete with other inaccuracies and misstatements which can be properly refuted only by an equally long reply.

Such conflicts demonstrate the need for certiorari rather than support the opinions of the Court of Appeals.

CONCLUSION

The Court of Appeals' opinions that supervising authorities cannot be tried for fraud and corruption, nor compelled to account for seized savings, are blots upon the integrity of our Government.

That respondents, in their oppositions, assert such immunity and seek dismissal without trial, demonstrate that certiorari is required, lest public faith in the honesty of

our Government, already badly shaken, be completely destroyed.

Respectfully submitted,

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LYMAN B. SUTTER,
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RAYMOND TREMAINE,
Attorney for Petitioner Robert H. Wallis.

By:

CHARLES K. CHAPMAN,
Attorney for Petitioner Long Beach Federal Savings and Loan Association.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 592

WILMINGTON FEDERAL SAVINGS & LOAN ASSOCIATION, and W. I. GILBERT, JR., for themselves and on behalf of FEDERAL HOME LOAN BANK OF LOS ANGELES, and its stockholders,

Petitioners,

vs.

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY,

Respondents and Appellants Below.

Answer to Brief for Respondents Federal Home Loan Bank of San Francisco and Respondents Fahey, Ammann, Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, Divers, Adams, La Roque, Heisler, and Bramley in Opposition.

This reply is filed on behalf of Wilmington Federal Savings & Loan Association and W. I. Gilbert, Jr., in Petition No. 592. It answers only those contentions of respondents Federal Home Loan Bank of San Francisco and respondents Fahey, *et al.,* which directly concern the issues of the Los Angeles action.

POINT I.

The Argument That the Dissolution of the Los Angeles Bank Was a Governmental Act Into the Propriety of Which the Courts Cannot Inquire Is Not Tenable.

One of the chief points presented by Wilmington's petition was whether judicial review is available to determine whether the liquidation of the Los Angeles Bank amounted to an unconstitutional use of constitutional power, and was "unlawful" and "void," "wholly punitive" and an "arbitrary abuse of discretion * * * amounting to fraud in law."

The answer of Fahey* admits (pp. 11-12) by reference to the answer of the same respondents in No. 591 (pp. 41-42) that "personal corruption or breach of trust for personal gain" would furnish a ground for the courts to review the administrative action of the Federal Home Loan Bank Board. This admission is significant. But what follows (Fahey's answer in No. 591, p. 42) is a deplorable piece of sophistication. It is stated that in the instant case the allegation that false findings were knowingly made, falls short of an allegation of personal corruption, and is only a "synthetic" charge of fraud!

The Los Angeles action goes beyond the mere allegation "synthetic" fraud to the effect that the findings were made in the knowledge that they were false. But even the government's suggestion that its agencies may commit

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*By this designation we refer throughout to the answer of respondents Fahey, *et al.*, in No. 592.

"synthetic fraud" is shocking indeed, and if administrative power is exercised these days under such a conception, then a clearer case for granting certiorari and correcting so monstrous a notion cannot be imagined. Paraphrased, Fahey's argument means that the administrative officer can be arbitrary, can be capricious, he can make findings known to be false, he can use his power to punish those who oppose him, and in all these matters the courts are powerless to grant review unless there is further evidence of breach of trust or financial gain!

The answer of the San Francisco Bank (p. 13) on this point is equally unsatisfactory. It says: since the statute in so many words entitles the Board to liquidate Federal Home Loan Banks when it finds that the efficient and economical accomplishment of the purposes of the Federal Home Loan Bank Act will be aided thereby, all the board needs to do is to repeat in its findings the magic incantation suggested by the wording of the statute. The use of the verbal formula contained in the Act, so the argument implies, casts a paralyzing spell over all further inquiries by the courts. But this is not so. That the question of "ill will and malice" on the part of the supervising authorities may be submitted to the courts has been indicated by this Honorable Court in the previous appeal of this very case.

> *Fahey v. Mallonee,* 332 U. S. 257, 91 L. Ed. 2030, 2041.

Even if there were but "disinterested malevolence," it would move this court to action, as appears from *American*

Bank v. Federal Reserve Bank of Atlanta, 256 U. S. 350, 65 L. Ed. 983, 990:

> "If without a word of falsehood, but acting from what we have called disinterested malevolence, a man by persuasion should organize and carry into effect a run upon a bank, and ruin it, we cannot doubt that an action would lie . . ."

This Honorable Court has decided in too many cases to leave room for dispute that the courts will always inquire whether the delegated administrative power has been exercised in the mode and within the bounds set by the statute. See

Land v. Dollar, 330 U. S. 731, 91 L. Ed. 1209;

Board of Governors v. Agnew, 329 U. S. 441, 91 L. Ed. 408;

United States v. I. C. C., 337 U. S. 426, 93 L. Ed. 1451;

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 95 L. Ed. 817;

Hynes v. Grimes Packing Co., 337 U. S. 86, 93 L. Ed. 1231;

Williams v. Fanning, 332 U. S. 490, 92 L. Ed. 95;

Stark v. Wickard, 321 U. S. 288, 88 L. Ed. 733;

Youngstown Sheet & Tube v. Sawyer, 343 U. S. 579, 96 L. Ed. 1153.

These cases are analyzed in Point XIII of the joint reply of the remaining petitioners, and reference is hereby respectfully made to that discussion.

POINT II.

Members of Federal Home Loan Banks Have Proprietary and Justiciable Interests as Members of Such Banks.

Another point raised by the petition of Wilmington is that by the dissolution of the Los Angeles Bank and the creation of the San Francisco Bank, the stockholders of the Los Angeles Bank were deprived of proprietary and justiciable rights without hearing. Neither Fahey nor the San Francisco Bank adequately answer this point.

It does not follow from the fact that Federal Home Loan Banks are governmental agencies, that they have none of the aspects of proprietary corporations and that its members have no justiciable or property interests. On the contrary, the very case which Fahey cites proves his assertion to be wrong. We read in *Federal Land Bank v. Priddy,* 295 U. S. 229, 231, as follows:

> "In interpreting §4, it is to be borne in mind that federal land banks, although concededly federal instrumentalities, possess also some of the characteristics of private business corporations. See *Federal Land Bank v. Gaines, supra* (290 U. S. 254, 78 L. ed. 301, 54 S. Ct. 168). The statute does not contemplate that their stock is to be wholly, or even chiefly, government owned. Its acquisition by private investors is permitted, §5, and its subscription by the borrowing national farm loan association is compulsory, §7. The operations of the federal banks are, in the part at least, for profit, §5. In the conduct of their business they may enter into contracts, §4,

borrow money, receive interest and fees, §13, pay the expenses and commissions of agents, §15, and pay dividends on their stock, §5. While they are required to deposit in trust farm mortgages as security for farm loan bonds, §13, they may acquire and dispose of property in their own right, including land. §13. *They thus have many of the characteristics of private business corporations, distinguishing them from the government itself and its municipal subdivisions, and from corporations wholly government owned and created to effect an exclusively governmental purpose.* This is a circumstance which gives some support to the inference that the intended scope of the liability to suit includes judicial process incident to suit." (Emphasis ours.)

In consequence, this Honorable Court held that Federal Land Banks are subject to attachment and execution issued out of state courts. Nor does *Federal Land Bank of St. Paul v. Bismarck Lumber Co.,* 314 U. S. 95, hold that stockholders of Federal Land Banks do not have proprietary or justiciable interests in such institutions. On the contrary, it merely holds that in its character as an instrumentality of the Federal Government, it is exempt from State taxes.

The fact that these institutions are heavily subsidized by the United States Government does not invite the conclusion that its members have no proprietary or justiciable interest. In fact, they are not truly subsidized by the Federal Government. The Federal Government is an investor in them and, like any other investor, is entitled to have its investment returned in the event of a dissolution.

The fact that the corporate existence of the Bank may be terminated, does not indicate that a proprietary or

justiciable interest is lacking. The power of the United States Government to dissolve a Federal Home Loan Bank, whether the power is derived from the Act or from the Charter, issued pursuant to it, provides that the dissolution must be "under the Federal Home Loan Bank Act." This clearly means that the provisions of the Act must be followed in any dissolution. It is not the power of dissolution that is attacked in this case. This power, as long as it is exercised in conformity with the statutory provisions, is beyond dispute. It is the arbitrary, punitive, and unconstitutional use of the power which is the subject of complaint in these appeals.

Since the bank can be dissolved only "under the Federal Home Loan Bank Act," it must be proper for the members of the bank to complain if the provisions of the Federal Home Loan Bank Act were not followed. The Federal Home Loan Bank Act does not confer a naked power on the Board. On the contrary, the exercise of the power is circumscribed by precise provisions. These were set out in Wilmington's petition for certiorari, pages 32 to 38. Except for one, we shall not reiterate them.

It was not incumbent upon the Portland Bank to accept all of the assets of the Los Angeles Bank. The statute says that it "may" do so, but it is not compelled to do so. The fact is that the assets were transferred to the Portland Bank "without any resolution or request of the Portland Bank to assume any of the liabilities of the Los Angeles Bank" (Appeal No. 12591, p. 294). But the statute expressly provided that while the bank "may" acquire the assets, if it does, it must assume the liabilities. That the word "may" in this connection is not mandatory but clearly permissive appears from *Farmers & Merchants*

Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. Ed. 1157, 1165, where the words "may receive" were held to be,

> "words of authorization merely. It is true that in statutes the word 'may' is sometimes construed as 'shall.' But that is where the context, or the subject matter compels such construction. . . . Here it does not. This statute appears to have been drawn with great care. Throughout the act the distinction is clearly made between what the Board and the Reserve Banks 'shall' do and what they 'may' do."

Only Fahey makes an attempt to reply to the obvious fact that the members of the Los Angeles Bank suffered an actual financial loss by its liquidation. But, frankly, we do not understand his argument. In the case of Wilmington, so the answer maintains [No. 592, p. 10], the loss amounted to only $2,698.00, which is termed a "relatively insignificant" loss considering the large capital of the Los Angeles Bank. Pushed to its logical conclusion, this argument can only mean: You may destroy as much property of a corporation as you want, as long as you take care that the amount you take from each stockholder is "relatively insignificant."

The argument that the proprietary interests of the members of the bank were not involved is not helped by a reference to Section 6(i) of the Federal Home Loan Bank Act (12 U. S. C. §1426 (1)). That provision deals with individual withdrawing members or members that are expelled for disciplinary reasons. But when the entire bank is liquidated, the Act clearly requires that its stock be "paid off" (12 U. S. C. 1446), and this clearly means that not only $100.00 thereof be returned.

For still other reasons it is utterly wrong to say that the various members of the Bank have no proprietary interest therein Thus, they have a clear right to dividends (12 U. S. C. A. 1426 and 1436).

Next, the members have a right to have the stock paid off to them if the bank is liquidated (12 U. S. C. A. 1446).

Moreover, the right of any individual member to continue as a member of the bank is guaranteed for the corporate life of the bank and cannot be taken away except for cause (12 U. S. C. A. 1426, subd. (i)).

And finally, the members have voting rights. Those rights are valuable ones in any corporation. In that respect the question presented may be one of power, but surely that means that some impartial tribunal must exist to arbitrate disputes about the power. The San Francisco Bank has advanced no reason why it should be different in the case of a Federal Home Loan Bank. It refers to several cases on page 15 of its brief which are said to show that the loss of corporate voting power is not an invasion of a legally protected right That statement is palpably wrong. It is not supported by the cases cited. They all involve cases and acts of the Interstate Commerce Commission, either the adjustment of rates or the elimination of penalty charges or the long and short haul clause, and the only principle we gather from them is that shippers not directly affected by I. C. C. orders have no right before the courts because it is the express purpose of the I. C. C. to safeguard the interests of those members of the public who are not parties to the controversy at hand.

There are certain terms and conditions upon which one becomes a member of a Federal Home Loan Bank, but

this does not mean that one thereby loses any proprietary right or interest in the corporation and can henceforth be dealt with at the whim and pleasure of the Board. The fact, for instance, that stock may not be hypothecated except with the consent of the Board is a condition that is sometimes imposed in private corporations. Even private corporations may limit in their charter or by outside agreement, the alienability of their stock. But such agreements do not do away with the proprietary interests of the stockholders.

The bland assertion that the stockholders of a Federal Home Loan Bank have no proprietary interest in the corporation or its assets finds no support in any of the decided cases except in the very decision for the review of which we ask here for certiorari. The case of *Peoples' Bank v. Federal Reserve Bank of San Francisco,* 58 Fed. Supp. 25, which is referred to in San Francisco Bank's Brief (p. 16) is a case in which the member sought to enjoin the enforcement of a condition of membership to which it had previously assented. The court held that the party who imposed the condition, namely, the Federal Reserve Board, was not before the court and that the Federal Reserve Bank of San Francisco, *which was before the court,* had not imposed or exacted the condition.

The cases cited on page 17 of the brief of San Francisco Bank do not at all hold or even intimate that a person who acquires stock in a governmental corporation has no proprietary interest therein. One of them holds,

for instance, that a public utility has no right to be free from competition and therefore cannot challenge the constitutionality of the statute which created the Tennessee Valley Authority. (*Tennessee Electric Power Company v. Tennessee Valley Authority,* 306 U. S. 118.) Another case holds that private potential bidders on a government contract cannot question the correctness of the construction of a statute placed thereon by the Secretary of Labor. (*Perkins v. Lukens Steel Company,* 310 U. S. 113.) Similarly, the case of *Alabama Power Company v. Ickes,* 302 U. S. 462, merely holds that the taxpayer cannot enjoy what he conceives to be an unlawful use of Federal money, and, finally, *Massachusetts v. Melon,* 262 U. S. 447, holds that neither the state nor any of its taxpayers can enjoin, or raise the constitutionality of, the Maternity Act providing benefits out of Federal monies to those states which comply with the provisions of the Act and accept its terms.

No case, therefore, has been referred to which would show that the members of the Los Angeles Bank have no standing to maintain the Los Angeles action. The only case that does pass on the point is the very case which is the subject of this petition, and both the absence of authority on the subject and the importance of the question presented are an argument so strongly in favor of granting the petition for certiorari as to be, in our opinion, irrefutable.

POINT III.

The Los Angeles Action Is Not a Collateral Attack on Administrative Action.

Fahey also contends that the complaint in the Los Angeles action constitutes a collateral attack upon administrative orders, and that it does not allege any ground upon which the orders may be set aside.

But the attack is not collateral. The San Francisco Bank, under Orders 5082-5084 as muniments of title, claims to be entitled to the property in dispute. The orders are set out in the complaint. The Los Angeles action claims that these orders neither effect a dissolution of the Los Angeles Bank nor a transfer of its title, because they are "unlawful," "void," "wholly punitive" and "an arbitrary abuse of discretion . . . amounting to fraud in law." The precise question before the court is whether this two-fold accusation, namely *first,* that the orders are unlawful, and *second,* that they were fraudulent as alleged in the complaint, is true. The position of Fahey seems to be that the orders could not be unlawful, inasmuch as Sections 3, 25 and 26 of the Federal Home Loan Bank Act (12 U. S. C. 1423, 1445 and 1446) plainly authorize the orders. But, as the authorities in our petition have shown, not only those acts of the administrative power may be reviewed which are beyond the statutory grant of authority, but on review an inquiry may also be made to see whether the steps prescribed by the law, the safeguards contained in it, and the mode in which the

power is to be exercised, have been followed. In this respect, neither the petition of Fahey nor the answer of the San Francisco Bank makes any reply whatever to the matters contained on pages 32 to 38 of Wilmington's petition.

POINT IV.

The Los Angeles Action Does Not Ask for a Review of Questions Requiring Expert Knowledge.

The next argument of Fahey and the San Francisco Bank is that the orders in question should not be reviewed because, to use the words of Fahey (pp. 11-12),

> "these decisions are complex and delicate, and involve large elements of prophecy, specialized knowledge, information, and experience, and rest upon considerations not entirely susceptible of proof or disproof."

This statement entirely misconceives the nature of the relief which is sought in this case. In connection with these actions the District Court has never been asked to decide complex and delicate questions of banking, of expediency or of financial expertness. It has been asked to review the single question whether the power delegated by the Act to Fahey was abused and exercised for unfair, dictatorial, vindictive, punitive and fraudulent purposes. Questions of technical expediency, of expert knowledge, do not arise.

POINT V.

The Members of the Federal Home Loan Bank Board Are Not Indispensable Parties.

Fahey next contends that indispensable parties (namely the persons constituting the Federal Home Loan Bank Board) were not before the court, and that the court lacks jurisdiction over them. That argument has been met in great detail in the petitions already on file, but we add the following for this Honorable Court's consideration. The absent parties in this case are not required to take any action. The analogy with the steel seizure case is practically complete. In that case, the President who was not before the court had ordered the seizure of the steel mills and the transfer of the properties to the Secretary of Commerce. This Honorable Court directed the Secretary of Commerce to return the steel mills to their owners. In legal contemplation the seizure simply was never made because the power to make it was lacking.

> *Youngstown v. Sawyer*, 343 U. S. 579, 96 L. Ed. 1153, 72 S. Ct. 863.

In the instant case, if the allegations of the complaint are true, administrative orders Nos. 5082, 5083 and 5084 will be set aside, and a court so finding would merely declare that the state of affairs which existed before the seizure has in legal contemplation never been changed. It would first mean that the Los Angeles Bank has never been dissolved, and therefore it would not be necessary for the "indispensable parties" to make an order recreat-

ing the Los Angeles Bank, just as it was not necessary that the President of the United States should have made an order returning the seized steel mills to the owners. Likewise, no election is necessary because the persons that were officers of the bank in 1946 would still be officers, and the Federal Home Loan Bank Act provides ample means for the filling of vacancies that may have occurred.

Similarly, the dissolution of the San Francisco Bank would not be required. Since under 12 U. S. C., Section 1423, the Board has power to have not less than eight and not more than twelve Federal Home Loan Bank Districts, it would not be necessary for it to dissolve the San Francisco Bank, and therefore the reactivation of the Portland Bank would, likewise, be unnecessary. It certainly would not require the members of the Home Loan Bank Board to make the segregation of San Francisco's assets. In fact, none of the steps which are suggested as necessary and indispensable to be performed by the Federal Home Loan Board to restore the *status quo* are required. A simple judgment that the Los Angeles Bank still exists and that those of the assets of the Los Angeles Bank which were transferred to the San Francisco Bank must be returned, would grant the complete relief to which the Los Angeles Bank is entitled, and for that complete relief, no *in personam* decree against the members of the Federal Home Loan Bank Board is necessary.

Since the Board would not take any affirmative action, its members are not indispensable under the principles laid down in *Williams v. Fanning,* 332 U. S. 490.

As in the court below, so it is argued once more by the San Francisco Bank that the action cannot be maintained in the District of Southern California. Again, the only case cited in support of this position is the very case before this Honorable Court. The San Francisco Bank clearly and unmistakably is before the court. It is in possession of the assets which it has received by virtue of unlawful orders. This controversy, therefore, can be settled without the presence of the wrongful transferor.

The argument that the members of the Home Loan Bank Board are indispensable and that their personal appearance is required so that no effective decree can be rendered in their absence leads to an intolerable impasse. If they are joined in the action in California, they object to the jurisdiction of the court. When, on the other hand, the members are sued in the District of Columbia where they say they are amenable to process, it will be impossible to bring the San Francisco Bank before that court, so that, on respondents' theory, whichever tribunal is chosen, indispensable parties will be absent and the judicial power of the United States will not avail to give petitioners any remedy. For these reasons it must follow that the controversy should be adjudicated in the forum in which the property is located, and in which the persons are located which have it in their physical power to return the assets to their rightful owners.

POINT VI.

The Los Angeles Action Is Not in Fact a Suit Against the United States Government Without Its Consent.

Throughout their replies, respondents maintain that the suits against the San Francisco Bank are in fact suits against the government without its consent.

Congress, as the argument runs, both in the opinion of the court in the Los Angeles action and in the answer of the San Francisco Bank (p. 13) has pre-empted the field of banking activities in connection with home financing institutions. On the contrary, however, Federal Home Loan Banks while they wield life and death power over Federal Savings and Loan Associations, are still in competition with private lending institutions and some lending and financing even by Federal Savings and Loan Associations is done through institutions other than the Federal Home Loan Banks.

But even though Congress had pre-empted the entire field of home loan banking, it does not follow that the agency in which it has vested this pre-empted power is immune to suit. Congress has deliberately chosen the corporate form of organization for Home Loan Banks, it has deliberately provided that private capital may be contributed to that form of organization, and the amount of capital which the United States may contribute is strictly limited (12 U. S. C. Sec. 1426(f)).

Moreover, Congress has made these governmental organs expressly subject to suit (12 U. S. C. A. 1432) and

inasmuch as this provision is subject to no qualification or restriction whatever, it is clearly erroneous to say that the bank cannot be sued by persons who have a grievance. If Congress had wanted to do so, it would have conferred the immunity of the government upon these organizations, but it chose not to do it.

The corporate form having thus been chosen and the statutory creation of Congress having been given the right to sue and to be sued, the purported intention of Congress to clothe these banks with governmental immunity nowhere appears. To argue that the suit against the bank is in effect a suit against the government certainly avails nothing inasmuch as the sovereign can waive the immunity and in this case by the express wording of the Act has waived it. These principles were extensively discussed and firmly established in *Federal Land Bank v. Priddy,* 295 U. S. 229, 79 L. Ed. 1408, and *Keifer v. Reconstruction Finance Corporation,* 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784.

Conclusion.

In conclusion, it is again respectfully submitted that the opinion in the Los Angeles action raises questions of the utmost importance to the development and clarification of our system of administrative law. The opinions themselves virtually invite this Honorable Court to say the last word in these far-reaching controversies. Furthermore, the opinions contain pronouncements which virtually provoke further arbitrary action on the part of adminis-

trative officers. They can well be construed as a license to them to use administrative powers to further their own whim, caprice or desire to dictate. The almost universal human will for power needs no judicial encouragement. For all of these reasons, as well as for the reasons advanced in the petitions but not reiterated here, we respectfully urge the granting of certiorari.

Respectfully submitted,

W. I. GILBERT, JR.,

Attorney for Wilmington Federal Savings and Loan Association and for W. I. Gilbert, Jr.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 594

ERNEST R. UTLEY, as Receiver for Federal Home Loan Banks of Los Angeles, Portland, or San Francisco, Whichever Exists,

Petitioner,

vs.

JOHN H. FAHEY, HOME LOAN BANK BOARD, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, *et al.*,

Respondents.

Answer of Receiver Utley to Brief of Respondent Federal Home Loan Bank of San Francisco and Respondents Fahey, Ammann, Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, Divers, Adams, La Roque, Heisler, and Bramley in Opposition.

This reply is filed on behalf of Ernest R. Utley, as Receiver, in Petition No. 594. It is in answer to the separate memorandum of respondents Fahey, *et al.*, as well as to the argument found on pages 33-35 of the brief of San Francisco Bank.

Respondents first object to the receiver's petition on the ground that he was not a party to the proceedings below. This is not entirely correct. That he was not

a party to the original suits is true enough, but he is not a stranger to the record. A receiver was appointed before either of the opinions of the Appellate Court were handed down. The order appointing him was appealed in the consolidated actions. That appeal was pending when the Los Angeles action was dismissed by order of the Court of Appeals. He petitioned for a rehearing, and his petition was denied with the others. Nobody denies his appointment in the very actions in which certiorari has been asked for. The authorities cited in the memorandum of respondents Fahey and others are not in point and do not indicate that the receiver has no standing to petition. In all of them, people were involved who were complete strangers to the record.

The next point that is made against the receiver and his petition is that he is not impartial. He is, of course, aggrieved by the order of the Court of Appeals dismissing the actions in which he was appointed. This has the clear effect of removing him and terminating his authority to do anything further in the suits he has started pursuant to the order of the appointment. To that extent he cannot be impartial. He certainly should be in a position to urge that the dismissal was erroneous. By doing so, he does not take sides in the lawsuit, because only the ultimate decision of the questions presented, to wit, whether the Los Angeles Bank was properly or improperly dissolved, will decide to whom will inure the fruits of the litigation he had commenced pursuant to the order of appointment.

This appointment is clearly for the limited purpose of preserving certain causes of action, but the dismissal of the complaint makes that limited function impossible.

It has been continuously contended by respondents that the *Mallonee* action was not maintainable at all until further administrative remedies had been exhausted. It seems that a similar contention is not made with respect to the Los Angeles action.

When the receiver was appointed, a number of causes of action were about to become outlawed by the short Statute of Limitations of California. If the courts' hands were tied to do anything until the alleged administrative remedies were exhausted by the parties, these actions would have been lost to whichever one of the parties will eventually be entitled to the fruits thereof, and if the decisions of the Court of Appeals herein are permitted to have the effect of terminating the receiver's authority to proceed with the suits which he has already instituted, and to hold that matter in abeyance until administrative remedies have been exhausted, the causes of action in question will be lost forever, because already at this very moment the statute of limitations has run as to all of them and they can be preserved only by continuing the authority of the receiver, who instituted them in time, to continue with their prosecution.

If it were the law that the statute of limitations is tolled while parties pursue administrative remedies, the foregoing argument might lose its urgency, but there can be no doubt since the decision of this Honorable Court

in *Unexcelled Chemical Corporation v. United States of America,* 97 Adv. Rep. Law Ed. No. 9, page 486, that the statute of limitations begins to run when the cause of action accrues and is not suspended while the parties seek redress by pursuing their administrative remedies.

For the foregoing reasons, as well as for the reasons advanced in the petition of the receiver, it is respectfully urged that certiorari be granted herein.

Respectfully submitted,

W. I. GILBERT, JR.,

Attorney for Ernest R. Utley as Receiver for Federal Home Loan Bank of Los Angeles, Portland or San Francisco, whichever exists.

SUBJECT INDEX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.
No. 658

JOHN D. WILLHOIT,

Petitioner,

vs.

JOHN H. FAHEY, *et al.,* and FEDERAL HOME LOAN BANK OF SAN FRANCISCO,

Respondents.

PETITIONER'S REPLY BRIEF.

The petitioner desires to present this short reply brief relating to respondents' points which were not raised in the brief supporting petition for certiorari.

Since the date of filing petition for certiorari, this Court filed an opinion in the case of *Unexcelled Chemical Corp. v. United States of America,* October Term, 1952, No. 293, which supports the petitioner's authorities holding that where a District Court had jurisdiction of the subject matter and the parties, and in the course of litigation an administrative problem arose, the action in the District Court should be stayed pending the conclusion of the administrative proceeding.

Petitioner Is a Party to the Record of the Court of Appeals and He Is Bound by the Stay Order.

Respondents in their memorandum state a general principle of law to the effect that one who is not a party to a record and judgment is not entitled to appeal therefrom. The cases cited uphold that statement of law.

The petitioner is in an entirely different category than the unsuccessful parties in the cases cited by respondents. Petitioner is a party to the record [W. R. 92, 99, 113]. Counsel for petitioner appeared before Court of Appeals on November 7, 1952, in opposition to respondents' motion for order staying proceedings in the District Court [W. R. 113]. The petitioner is bound by the order of Court of Appeals staying proceedings in the District Court [W. R. 114]. Petitioner filed his record in the Court of Appeals pursuant to order of that Court [W. R. 117], and that record is now before this Honorable Court. The petitioner is a party to the record and he is bound by the order staying proceedings in the District Court.

Court of Appeals Order Wipes Out Petitioner's Legal Remedy for Recovery of Personally Owned Property.

The new second point raised by respondent not presented in the petition for certiorari is "* * * it is difficult to understand how the decisions of the Court of Appeals have prejudiced the petitioner's claim for the return of the allegedly withheld records." The qualifying adverb "allegedly" is misleading and implies a triable issue

of fact. This is not a correct statement of the record before this Honorable Court. The truth of the matter is that, after the complaint was filed in the District Court, respondents surrendered material Tax Court evidence consisting of 134 original cancelled checks belonging to petitioner in the total sum of $1,036,044.52 [W. R. 78]. The Court of Appeals order staying all District Court proceedings wipes out the petitioner's right to pursue his legal remedy for recovery of his privately owned property.

Tax Court Subpoena Is Not a Legal Remedy to Try Title to Property.

Respondents raise a new third point in stating that, "* * * a subpoena issued under Rule 44(c) of Rules of Practice of Tax Court of the United States would have served the same purposes as the lengthy complaint." A subpoena is not a legal remedy for the recovery of privately owned property. The Tax Court is not a court in the judicial sense. It is an administrative agency, "* * * an independent agency of the Executive Branch of the Government" (26 U. S. C. 1100). The Tax Court has no power to enforce its subpoenas. This is accomplished by District Court proceedings, *United States v. Union Trust Co. of Pittsburgh,* 13 Fed. Supp. 286, 53 Stats. 471.

Petitioner's action is in pursuit of legal remedies including [W. R. 68],

1. Replevin return of seized tax records;

2. Special damages;
3. General damages;
4. To enforce judgments;
5. For declaratory relief;
6. Accounting;
7. General relief;
8. Costs.

A Tax Court subpoena will not serve the same purposes as the petitioner's action in the District Court.

It is respectfully submitted that the points presented by respondents are not applicable, and the petition for certiorari should be granted.

EMMETT E. DOHERTY,
Attorney for Petitioner.